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No. 252

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1926

PORTNEUF-MARSH VALLEY CANAL COMPANY,
Petitioner,

vs.

HOWARD W. BROWN and JOHN R. CHAPIN, as Trustees.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The respondents, residents and citizens of the State of Massachusetts, are trustees for the owners of $212,500.00 of bonds secured by a mortgage upon an irrigation system and its appurtenant water rights, located in Bannock

County, Idaho. The irrigation system was constructed by the Portneuf-Marsh Valley Irrigation Company, an Idaho corporation, under the legislation commonly known as the Carey Act, and according to the terms of a contract of construction between the Portneuf-Marsh Valley Irrigation Company and the State of Idaho. These irrigation works were completed in the year 1915 and at that time accepted by the State and by the settlers who had purchased water rights therein, and were conveyed to the petitioner, Portneuf-Marsh Valley Canal Company, also an Idaho corporation, composed of the settlers owning water rights in the system. It has been owned and operated by the petitioner, Portneuf-Marsh Valley Canal Company, since its completion.

This suit was brought by respondents, as trustees for the bondholders, to foreclose the mortgage on the irrigation system and to foreclose also the pledge of certain collateral deposited with them as additional security for the bonds.

In the trial court the Portneuf-Marsh Valley Irrigation Company and the Portneuf-Marsh Valley Canal Company were the defendants, and the appellees in the Circuit Court of Appeals. As we are informed and believe, the Portneuf-Marsh Valley Irrigation Company does not seem to have been considered by the petitioner as a party to the proceedings in this Court.

For convenience, the latter company will be hereinafter referred to as the "construction company" and the petitioner, Portneuf-Marsh Valley Canal Company will be hereinafter referred to as the "operating company."

Notwithstanding the petitioner has in its brief rather fully set out the facts and circumstances surrounding

the case, it is perhaps desirable that respondents, at the risk of some slight repetition, re-state the facts considered pertinent.

On June 3, 1908, the construction company entered into a contract (R. 250) with the State of Idaho providing for the construction of an irrigation system to water a certain area of arid lands in Bannock County, Idaho, which lands had theretofore been segregated and set apart to the State under the federal legislation known as the Carey Act.

The contract between the State and the construction company, after describing the irrigation works to be constructed, recites (R. 257) that the construction company, to the extent of the capacity of the irrigation works:

> "Will sell or cause to be sold to the person or persons filing on any of the lands herein described or to the owners of other lands not described herein but which are or may be susceptible of irrigation from their canal system by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment, a water right or share in said canal for each and every acre filed upon or purchased from the State or acquired from the United States or held in private ownership."

The price at which the construction company was permitted to sell water rights or shares in this system was not to exceed $35.00 per acre for "Carey Act" lands, and not to exceed $25.00 per acre for state school lands and other lands (R. 258). The terms of sale were to be $3.00 per acre or per share cash, and the remainder in nine equal annual installments bearing interest at the rate of 6 per cent per annum.

Section 9 of the state agreement (R. 259) provides as follows:

"TRANSFER OF POSSESSION AND MANAGEMENT OF CANAL

"It being necessary to provide a convenient method of transferring the ownership and control of said canal and irrigation works from the said party of the second part herein to the purchasers of said water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein and for the purpose of operating and maintaining said canal during the period of construction and afterwards, and for the purpose of levying and collecting tolls, charges and assessments for managing said canal and for the management and operation thereof, it is hereby provided that as soon as said lands are ordered thrown open for settlement, a corporation to be known as the Portneuf-Marsh Valley Canal Company, Limited, shall be formed at the expense of the party of the second part, the Articles of Incorporation of said company to be approved by the Attorney General of the State of Idaho; that the authorized capital of said corporation shall be twenty thousand (20,000) shares, which amount is intended to represent one share for each acre of land which may hereafter be irrigated from said canal. All persons who, prior to the formation of such corporation, have purchased or acquired water rights from said second party for the irrigation of lands embraced in this contract, and being then the owners of such rights or shares, shall be entitled to receive and have issued to them, shares in such corporation to be formed, equal in number to the water rights or shares

of water then owned and held by such persons, and the remainder of the capital stock of such corporation shall be issued to the party of the second part in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock representing the same. Said shares of stock, however, shall have no voting power and shall be without force or effect until they have been sold or contracted to be sold to the purchasers of land under said irrigation works.

"At the time of the purchase of any water right after the formation of said corporation, there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon. That the said party of the second part herein shall, in case said water rights or shares of stock are not fully paid for, require the endorsement and delivery to it of said stock, and shall at the same time require of said purchaser an agreement that until thirty-five per cent (35%) of the purchase price of said stock has been paid, the said party of the second part therein shall vote said stock in such manner as it may deem proper at all meetings of the stockholders of said corporation."

Other pertinent provisions of the contract with the State were as follows:

"MORTGAGE

"The right, title and interest of the second party in the said works and irrigation system and in the said lands may be mortgaged, as provided by the said Acts of Congress and the laws of the State of Idaho, hereinbefore referred to; the form of such mortgage to be approved by the Attorney General of Idaho (R. 264).

"EXISTING LAWS PART OF CONTRACT

"It is hereby understood and expressly agreed that this contract is made and entered into by virtue of the provisions and subject to all of the conditions of an Act of Congress, commonly known as the Carey Act, approved August 18, 1894, and the acts amendatory thereto, and the laws of the State of Idaho, accepting the terms and provisions of the said 'Carey Act,' and the contract between the United States and the State of Idaho segregating from the public domain the lands herein designated as Carey Act lands, and that such laws and contract are as much a part of this contract as if specifically herein set forth." (R. 265.)

Since the state and federal laws referred to in the preceding paragraph of the State contract are of considerable importance in connection with this case, the pertinent sections thereof are printed as an appendix to this brief for convenient reference by the Court.

After some little construction work had been done upon the irrigation system by the construction company, the State of Idaho, on or about September 7, 1908, opened to entry the Carey Act lands (R. 103), and at about this time water rights for approximately 10,000 acres of land were sold by the construction company.

Just prior to the land opening the Portneuf-Marsh Valley Canal Company, Limited (the operating company) was organized, its articles of incorporation being approved by the Attorney General of Idaho in accordance with paragraph 9 of the State contract referred to above. This corporation was created as a convenient method (R. 259) of transferring the ownership and control of the irrigation

works from the construction company to the settlers. All the shares of stock in this corporation were originally to belong to the construction company in accordance with the State contract, as the consideration for the construction of the irrigation works. It was to receive the return of the money spent in the construction of the works, with reasonable interest thereon, through the sale of these shares of stock at a price and upon the terms of payment defined in the State contract. The form of contract under which the construction company sold water rights to the settlers at the time of the land opening and the form of stock certificate representing such water rights is shown in Plaintiff's Exhibit C-1 (R. 125).

Prior to the sale of the first water rights, that is, in August, 1908, the stockholders and board of directors of the construction company authorized a bond issue in the amount of $300,000.00, to be secured by a mortgage or trust deed upon the water appropriations and the irrigation works then being constructed. The trust deed, in addition to mortgaging the water rights and irrigation works, provided that before any bonds should be issued there should be pledged with the trustees for the bondholders to whom the mortgage ran, as additional collateral security, water right contracts in an amount aggregating, at par, one and one-half times the amount of bonds certified by the trustees as authorized to be sold (R. 39). These water right contracts were, of course, the contracts evidencing the sale to settlers of water rights or shares of water stock. Each settler's contract, to the extent of the deferred payments to fall due thereon, represented a lien upon the settlers' land of special statutory status in Idaho, each being in form a mortgage on the land and

appurtenant water right, and operating also as a pledge of the water stock contracted to be purchased under the terms of the water contract. In other words, the settler in contracting with the construction company for the purchase of a water right gave, under the terms of the purchasing contract, a lien upon his land and a pledge of his water stock to secure the deferred payments; and the construction company, to secure the trust deed above referred to, and as additional security for its bond issue, assigned to and pledged with the trustees these individual settlers' contract liens and the water stock in connection therewith.

Bonds in the amount of $212,500.00 were sold and marketed between the years 1909 and 1911 under this arrangement, and a large number of individual settlers' contracts, with the accompanying pledged water stock, was deposited with the trustees as additional collateral for the bonds as required by the trust deed.

In the year 1915 the irrigation project was completed and accepted by the State of Idaho, and by the settlers. There were certain minor disputes on details of construction, and these were compromised by the construction company paying to the operating company $31,000.00 to remedy and repair alleged defects and insufficiencies. While the project was not turned over as completed until the year 1915, it had been so far completed as to permit the delivery of water therefrom since the year 1912. The State contract provided that the construction company might vote the settlers' stock in the operating company until 65 per cent of the purchase price of water stock was paid, but the construction company had long before the year 1915 waived this right to vote the stock (R. 150,

f. 230). In 1915 when the irrigation system was accepted by the settlers and the State as completed, a detailed agreement was entered into between the construction company and the operating company defining precisely the terms of the acceptance and defining the conditions of settlement of any controversies existing between them (R. 151). It provided for reducing the project, which was originally designed to irrigate 20,000 acres, to 14,000 acres, it being stipulated in the settlement agreement that the construction company might sell water rights or water stock of the operating company to the amount of 14,000 shares, but no more (R. 155). The settlement agreement also provided for an extension of time to the settlers with respect to the payments becoming due on their water contracts (R. 153).

The settlement agreement was submitted to the stockholders of the operating company for ratification and was ratified practically unanimously; following which, on March 25, 1915, the operating company and the construction company jointly petitioned the State Land Board to ratify and approve the settlement and accept the system (R. 150). This was accompanied by petitions to the State Land Board to the same effect, signed by a large number of individual settlers or stockholders of the operating company (R. 160-162).

On March 31, 1915, action was taken by the State Land Board granting the petitions (R. 163).

Accordingly, since the spring of 1915, the irrigation system has been operated by the operating company. On January 1, 1917, by delivery of deed dated August 1, 1916 (R. 171), the irrigation works and water rights in their entirety were conveyed by the construction com-



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pany to the operating company, subject to the trust deed securing the bonds (R. 174).

Following the settlement agreement under which the project was accepted and conveyed to the operating company, the construction company entered into "new form" water contracts with practically all the settlers. This new form contract provided an extension of time for payment as promised in the settlement agreement between the construction company and the operating company (R. 153). The new form water contract is shown in plaintiff's exhibit C-2 (R. 133).

Subsequent to 1915 no interest was paid upon the bond issue. Certain of the settlers made default in the payment of the principal and interest due on their water purchase contracts. Some of these settlers failed to comply with the State law with reference to settlement and cultivation of the lands included in their Carey Act entires and their entries were, by petition and application of the operating company, cancelled by the State Land Board (R. 164-170). The settlers upon perhaps 2,000 acres were thus eliminated.

In some cases the trustees for the bondholders, upon default being made in the payment on said water contracts, instituted foreclosure proceedings and upon foreclosure sale acquired the lands described in the individual water contracts of certain settlers and the water stock in connection therewith. Approximately 1,000 acres of land with the accompanying water stock have been thus foreclosed upon by the trustees, and are held under sheriff's deeds (R. 139-140).

In other cases, during the progress of or in contemplation of foreclosure proceedings, quit-claim deeds to the

land and water stock were taken from the settlers and the trustees hold this property likewise in substituted pledge as security for the bondholders. Approximately 800 acres of land with the accompanying water stock have been taken over by the trustees in this manner (R. 144-147).

The respondents are the successors in office of the original trustees for the bondholders, and, as stated above, brought this action to foreclose the mortgage upon the irrigation system and to foreclose also in the same action the pledge of the additional collateral they hold in pledge, consisting (1) of individual water contracts of settlers with the accompanying water stock, and consisting (2) of the land and appurtenant water stock acquired in foreclosure proceedings against individual settlers or acquired by quit-claim in connection with foreclosure proceedings and now held in pledge.

The construction company, though entering its appearance, presented no answer or defense. The operating company is the present owner of the irrigation works, and being impleaded in the suit in order to require it to set up the nature of its claim on the mortgaged property and the water stock held by plaintiff in pledge, it answered that by reason of the necessity of operating and maintaining the canal system and distributing the waters therefrom, it had levied each year upon its stockholders certain assessments upon the capital stock; that in the case of a large number of stock certificates the assessments had not been paid and the stock had been advertised and sold at public auction, at which sales the operating company became the purchaser (R. 71-72). That the amount of the delinquent assessments upon such stock aggregated $80,252.98, and that by reason of the failure and refusal

of the several stockholders of the construction company and of the respondents as pledge holders of the stock to pay the assessments so levied, the title to said stock, by reason of such sales, had passed to the defendant operating company, together with a proportionate interest in the irrigation system (R. 72).

The question presented then for decision to the lower court was the question of the relative priority of the lien or claim of respondents and of the operating company on that proportionate interest in the irrigation works and water rights represented by the stock which was claimed by the operating company. Respondents' claim is by virtue of its general mortgage on the entire irrigation system authorized in August, 1908, and by virtue of pledge to them of the water stock as security for the outstanding bonds. The operating company's claim is by virtue of its stock assessments and the proceedings for the enforcement thereof. The operating company did not insist upon being decreed the absolute ownership of the water stock claimed to have been purchased by it for delinquent assessments or the absolute ownership in the proportionate interest of the irrigation system represented thereby, but it claims a lien thereon subject to redemption in the amount unpaid on delinquent assessments, with interest and penalties.

After hearing all the issues and contentions thus made, the trial court made its decree awarding the operating company a prior lien on the certain several parcels of the water stock in controversy, the liens upon the several parcels of stock being in varying sums based on the unpaid assessments, the aggregate amount being $89,417.64 (R. 337-339). The decree directed that upon the sale of the

pledged property in accordance with the decree, the above sum should be paid to the operating company before any money was paid to respondents in satisfaction of the bonds (R. 342).

Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the decision was modified so as to give to the respondents here the prior lien. The opinion of the Circuit Court of Appeals appears in the record beginning at page 350, and the decree of that Court is at page 358. The opinion is reported in the case of Brown vs. Portneuf-Marsh Valley Irrigation Company, 5 Fed. (Second) 895. The opinion of the trial court, the District Court for the District of Idaho, is reported in 299 Fed. 338 (R. 295-314). The decree of the trial court appears in the record at pages 315 to 344. The particular portion of the decree of the District Court of Idaho which is in issue here is paragraph 6, at pages 337 to 339 of the record.

The case is here for consideration on writ of certiorari.

STATEMENT OF THE ISSUES

Respondent's contentions are as follows:

(1) That under the provisions of Section 3019, Idaho Compiled Statutes, a Carey Act construction company is by express terms given a first and prior lien for the purchase price of its water rights on the water stock and the land to which it is appurtenant, and that no sale of stock by the operating company to enforce delinquent assessments can be of any force or effect to divest the construction company or its successors or assigns of such prior statutory lien.

(2) That with respect to the water rights, the water contracts in controversy operate as purchase money

mortgages, and under the provisions of Section 6351, Idaho Compiled Statutes, "have priority over all other liens created against the purchaser subject to the operation of the recording laws."

(3) That respondents as mortgagees of the entire corpus of the property under a mortgage given long prior to any claim of the operating company on the stock have, independently of their pledge of the water contracts and stock collateral, a prior lien on the proportionate interest in the irrigation works represented by the water stock in controversy.

(4) That the by-laws of the operating company, its contracts and the deed under which it received the irrigation works subject to the mortgage recognize in express language that "all shares of the Canal company (operating company) • • • shall be held subject to the rights of Portneuf-Marsh Valley Irrigation Company, Limited, until the amount due such company, its successors or assigns shall have been fully and finally paid."

(5) That the lien of the operating company under the respective assessments and the sales held to enforce the collection thereof is void for the following reasons:

(a) That each of the assessments under which the operating company claims was void because admittedly in excess of 10 per cent of the amount of the capital stock named in the articles of incorporation of the Portneuf-Marsh Valley Canal Company, contrary to the express provisions of Section 4734, Idaho Compiled Statutes.

(b) The respective assessments are invalid as statutory assessments, because the respective orders levying

such assessments fail in almost every respect to comply with the provisions of Section 4736, Idaho Compiled Statutes.

(c) The respective sales held to enforce these assessments are invalid because they are not in accordance with Sections 4737-4747, inclusive, of Idaho Compiled Statutes.

(d) Because all the assessments on any parcel of stock, except the first assessments, to-wit: that assessment for which the stock was initially sold to the operating company, are void on account of the fact that a corporation is powerless to assess stock in its treasury.

(e) Because any assessments levied between the 2d day of December, 1918, when the operating company became defunct for failure to comply with the laws of the State of Idaho relating to corporations, until the 14th day of September, 1921, when it was reinstated, are void because the operating company was a defunct corporation, and its directors were powerless to levy assessments (R. 148-149).

ARGUMENT

The brief of petitioner discusses only one phase of the issues here involved. It repeats and elaborates merely one aspect of the trial court's opinion. It is felt that the real brief for petitioner and the one upon which it in fact relies, is the exhaustive and persuasive opinion of the trial court found in the record at pages 295 to 314, inclusive. It is felt that the fallacy of the trial court's conclusions can be demonstrated. Since neither the opinion of the Circuit Court of Appeals (R. 350-358) nor the brief of petitioner in this Court deal with all the matters set out

in the trial court's opinion, it seems that the most orderly arrangement of this discussion would be to follow the order in which the issues are set forth and discussed in the trial court's opinion. After doing this, we shall particularly consider the specific point emphasized in the petitioner's brief.

RESPONDENTS' LIEN FOR THE PURCHASE PRICE OF THE STOCK IS SUPERIOR TO ANY POSSIBLE LIEN OF THE OPERATING COMPANY BY REASON OF MAINTENANCE ASSESSMENTS.

It is clear, of course, that the only method by which the construction company or its assigns can be reimbursed for the cost of building the irrigation system is through the sale of water rights or shares represented by the stock of the operating company. In order to facilitate the reclamation of arid lands under the Carey Act, it is provided by Act of Congress (29 Stat. 413) that:

> "A lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon * * *"

In the act of the Idaho Legislature accepting the benefits of the Federal Carey Act it was provided:

> "Any person, company or association furnishing water for any tract of land shall have a first and prior

lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied, according to the terms of the contract under which said water right was acquired."

Section 3019, Idaho Compiled Statutes.

It is plaintiff's contention that the above statute is decisive of the issues presented here for decision; that this staute, being at all times a part of the law of the State, was written into and became a part of the State contract; and became a part of every other contract or document in this record.

The learned trial court held that the above statute has no application to the issues herein. The written opinion on this point (R. 302-305) may be analyzed as follows:

Section 3019, Idaho Compiled Statutes (relating to priority of lien of construction company for purchase of water right), does not apply in this case because:

(1) The lien of the operating company was not "created or attempted to be created by the owner or possessor of the land."

(2) The statute can have application only to suits foreclosing the individual water contract liens, and this is not a suit of that nature as respects the pledged and unforeclosed water contracts.

(3) As to water contracts foreclosed on or held by plaintiffs under quit claim deed equivalent to fore-

closure the lien has been fully extinguished with the water user's obligation to pay, and plaintiffs have no lien thereon. The lien has been merged in the judgment of foreclosure.

We respectfully urge that the reasoning of the trial court's opinion is in error with respect to each of the three bases for its conclusion as given above.

THE PRIORITY OF LIEN ACCORDED BY SECTION 3019 IS A GENERAL PRIORITY SUBJECT ONLY TO STATE AND COUNTY TAXES.

With respect to conclusion No. 1 on this point of the court's opinion, we urge that the statute gives a *general* priority to respondents' lien, and a fair construction of the statute should not limit its application only to other liens "created or attempted to be created by the owner or possessor of the land." The first clause of the statute quoted above establishes generally the priority of the lien. Is it not more reasonable to construe the second clause:

> "said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land,"

not as a limitation on the general priority of the lien, but as an attempt by the Legislature to emphasize and point out the powerlessness of the owners of the land to create a lien which should take precedence over the general priority theretofore in the section established. The preceding and succeeding clause clearly relate to a general priority of lien. The trial court considers alone the

middle clause of the trio quoted above and construes this middle clause as a limitation on the other two. We think a reading of the whole statute clearly signifies the intent of the Legislature to establish a general prior lien.

There is, of course, the implied exception of taxes levied by the sovereign for the purposes of government. That is an implied exception that is always read into statutes imposing or authorizing liens. Subject to that sole exception, it would seem the reading of the entire statute discloses an intention on the part of the Legislature to grant a lien prior to all other liens.

The Circuit Court of Appeals in reversing the Trial Court deemed this the only point necessary to consider, and disposed of it as follows:

> "The learned Judge of the Court below held that that section of the Idaho statute is not applicable to the case • • •
>
> "The first and main reason assigned by the Trial Court in its opinion for such holding is that the priority of liens to be given to the person or company furnishing the water for the irrigation of the land is only over liens 'created or attempted to be created by the owner or possessor' of the land.
>
> "We think that construction wholly inadmissible. • • •
>
> "The intermediate clause, 'Said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land,' merely gives expression to what would otherwise be clearly the legal effect of the section."

In the petition for writ of certiorari in this case it was claimed that there was a conflict between the reversing opinion and the construction put upon this statute by

the Supreme Court of Idaho in the case of Trust & Savings Bank vs. Werner, 36 Idaho 601.

In that case the court was considering the relative priority of the lien of the sovereign state for taxes upon land covered by a Carey Act contract, and the lien imposed by such Carey Act contract under the provisions of Section 3019. And the Supreme Court of Idaho in the Werner case said:

> "Under C. S. Section 3019, supra, the only liens to which the lien of a Carey Act contract is superior are those created or attempted to be created by the owner and possessor of the land, and this is not a limitation upon the power of the sovereign to create a lien."

We do not think that this expression can properly be construed as a construction of the statute by the Supreme Court of Idaho binding on this Court or the Circuit Court of Appeals in a case where the paramount right of the sovereign to impose tax liens is not involved.

> Carroll vs. Lessees of Carroll, 16 Howard 275, 14 L. ed. 936.

The language of Mr. Chief Justice Marshall in Cohens vs. Virginia, 6 Wheat. 399, is illuminating and just:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the Court is investigated with care

> and consideration in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In statutes having relation to the priority of liens as between private persons there should always be read an implied exception of tax liens which arise out of the necessities of government in organized society. An expression of the Idaho Supreme Court in seeking additional reasons for its highly proper decision in the question then before it should not be considered as a binding construction of a statute involving the priority of liens as between private interests. The opinion in the Werner case expressly and clearly shows that with respect to the lien on the *water right* as distingusihed from the land, the intention of the holding is indubitably to protect even as against taxes the lien upon the *water right* granted under a Carey Act contract; so the court in the Werner case referred with approval to the case of Bennett vs. Twin Falls North Side Land & Water Company, 27 Idaho 643, 150 Pac. 336, in language as follows:

> "In the latter case this court held that the purchaser of a tract of Carey Act land at tax sale may be subrogated to all the rights of the entryman *so far as the water right is concerned* and may procure the title thereto by making the payments provided for by the water contract and in accordance with its terms."

THE LIEN OF THE OPERATING COMPANY FOR ASSESSMENTS IS A LIEN CREATED BY THE OWNER OF THE LAND.

Even though this Court should feel that a proper construction of Section 3019, Idaho Compiled Statutes, limits the priority there expressed "to any and all other liens created or attempted to be created by the owners and possessors of said lands," we think it susceptible of demonstration that the lien on the water stock claimed by the operating company is, in fact, a lien created by the owners of the land. Each settler, in becoming a stockholder of the operating company, by an implied contract obligated himself to pay the assessments as levied.

> "The relation existing between a corporation and its stockholders and between the stockholders inter se is one of contract, in which the charter and by-laws of the corporation, the pertinent statutes of the state, and the settled law of the land are embodied." 14 C. J. 843, Sec. 1283.

Not only by contract necessarily implied growing out of his relation as stockholder of the operating company, but also by express agreement in the contract of purchase of the water stock, the purchaser in each case expressly agreed to pay the maintenance charges. The language is as follows:

> "The purchaser agrees to pay said charges in advance at the office of the Portneuf-Marsh Valley Canal Company, Limited, on the first day of April of each year without notice." (R. 127.)

Is it not beyond any question the act of the settler in assuming the obligation to pay the maintenance and his

default in not so paying it which has created the lien upon the water stock now claimed by the operating company?

Assume that the stockholder, while on his land, contracts a bill for groceries, or contracts a bill for lumber for building a house, and fails to pay these bills. Under the Idaho laws, and under the laws of most states perhaps, the storekeeper could levy an attachment on the settler's land and water stock; or the lumber dealer could file a materialman's lien on the house and so much of the land as is necessary for its use and occupancy. Could it be seriously urged that such liens would not under the State statute quoted above be inferior to respondents' lien for the purchase price of the water stock. Could it be successfully argued that such attachment lien or such materialman's lien was not one "created by the owner of the land"? Would the owner of the land not have created such a lien by his assumption of the obligation to pay and his subsequent default in not so paying the bill of the storekeeper or the bill of the lumber dealer? Could it be urged that because the settler did not vote for the sheriff who levied the attachment or help elect him, or because he did not vote for the Judge who granted the lien foreclosure, such liens were not within the purview of the statute quoted as being inferior to respondents' lien on the land and water right for the purchase price of the water right? Yet such was the trial court's reasoning. The trial court said:

> "Neither nominally or actually was the assessment or sale for delinquency made by the owners of the land; both were made by the corporation, acting through its board of directors, an entity entirely dis-

tinct from the land owner, although he was a holder of some of its stock." (R. 302.)

It must be remembered that the operating company is *really the settlers themselves*. Acting together and in the aggregate they elect their own directors. These directors are their agents, and the agents of no one else. Even though it may not be shown by the record, as the trial court points out in its opinion, that any particular settler voted for the directors who levied the assessments, did not the stockholders in the aggregate elect such directors? Is it not too narrow a construction of this statute to contend that, because no single stockholder can be shown to have elected the directors who levied and enforced the assessments, the stockholders acting in the aggregate can by the action of their own agents in voting assessments, and then by their individual acts in the non-payment of assessments, and then again by the acts of their own agents, the directors, through the sale of the stock for delinquent assessments, extinguish the lien of the construction company for the purchase price of the stock, and thus acquire *in group ownership* a lien prior to the lien of the construction company representing the purchase price of the water rights. This Court will look through and beyond the entity of the operating company to the individuals who compose it. The operating company was a mere instrumentality for transferring the ownership, operation and control of the irrigation works after its construction and its sale to the individual settlers.

The trial court even intimates (R. 303) that the construction company might have been responsible for the levying of the assessments through the delegation to it

of voting power upon the stock, as provided in the settler's contract. Such an assumption is entirely unwarranted by the facts. Long before the year 1915 the construction company had waived the voting power on the settlers' stock accorded by the State contract and the individual settlers' contract, even though 65 per cent of the purchase price remained unpaid.

In the joint petition of the construction company and the operating company to the State Land Board, dated March 25, 1915, it is said (R. 150) that the voting power of the construction company upon the stock had long ago been waived so that each settler was voting his own stock either in person or by proxy. In the new form contracts entered into by the settlers in 1915 providing for an extension of time of payment, it was indeed provided that while the settler was in default with respect to the payments, the construction company might vote the stock (R. 135), but the trial court's inference that the construction company, or these respondents, had authority to or did vote the stock at the election of directors, and thus indirectly impose the assessments, is entirely unjustified.

In the first place, the presumption would be that there was no default in the payment under any given settler's contract unless the contrary was shown. The contrary was not shown. In the second place, the by-laws of the operating company expressly provide that the *unsold* stock shall have no voting power (R. 287). Thirdly, under section 6 of Article 1 of the by-laws, no stockholder who is indebted to the operating company may vote his stock at any meeting. The shares of stock in controversy having delinquent assessments thereon could not,

therefore, under this by-law be voted by anybody. With respect to many of the water contracts and shares of stock held in pledge by respondents, the payments of the installments of the purchase price have been fully kept up and are not now and never have been delinquent. Many indeed are fully paid for. Since under the by-laws of the operating company neither the construction company nor the respondents could vote the stock upon which there were delinquent assessments nor could vote the stock upon which payments had not been in default nor the stock paid for in full, the inference of the trial court above stated is unfair and erroneous, as shown by the evidence.

Can it be supposed for a moment that this litigation would be pending at all if the trial court's intimation were correct, that the respondents are controlling the construction company and the latter, through its ability to vote stock, is in control of the operating company.

The lien of the operating company, if it has a lien, arises directly out of the settler's obligation to pay assessments and his default with respect to that obligation. The lien is thus created "by the owner and possessor of the property." It would seem that any fair construction of Section 3019 should and must include an act of omission of the owner or possessor of the land as well as an act of voluntary commission. If its application were restricted to liens directly created by the owner or possessor of the land, such as junior mortgages, and not made to include attachments, judgments, mechanics' or materialmen's liens, the lien of the operating company here under consideration, and in short any lien arising out of the failure of the settler through acts of omission or otherwise to dis-

charge his obligations, then this statute would really be like the prophecies of the witches to Macbeth:

> "That palter with us in a double sense,
> And keep the word of promise to our ear
> And break it to our hope."

SECTION 3019 HAS APPLICATION TO THIS SUIT AS WELL AS ANY OTHER SUIT INVOLVING THE PRIORITY OF LIENS.

The second reason, according to the trial court's opinion, why the statute cannot be invoked by respondents in this case, is that:

> "The trustees are here seeking to foreclose only the lien of the trust deed. They are not as pledgees attempting to foreclose the liens of the water contracts; to such proceedings the several settlers would, of course, be indispensable parties; and in any view of the statute in question, it can have application only to such liens and such proceedings. It, therefore, follows that insofar at least as concerns the stock embraced in the 5,495.2 shares that pertains to water contracts which are still outstanding and have never been taken over by the plaintiffs, the statute has no application." (R. 304.)

Let us analyze the pleadings for a moment and see if this is a correct statement. The complaint seeks to foreclose the mortgage upon the irrigation works. But it seeks also to foreclose the pledge of the water stock pledged and deposited for the security of the bondholders; not indeed as against the individual settlers, but against the construction company and the operating company. The complaint alleges:

"That plaintiffs are informed and believe and therefore allege that said Portneuf-Marsh Valley Canal Company, Limited, has from time to time heretofore levied certain pretended assessments upon its capital stock • • • that among the shares of stock upon which said pretended assessments were sought to be levied are the shares of stock held by these plaintiffs as collateral security • • • that said defendant Portneuf-Marsh Valley Canal Company, Limited, claims that by reason of said pretended liens and certain other proceedings for the enforcement thereof that it has a claim or lien upon said shares of stock or some of them prior and paramount to plaintiffs' claim and lien thereon." (R. 22.)

And the prayer of the complaint is, in part:

"That the defendant Portneuf-Marsh Valley Canal Company, Limited, a corporation, may be required to answer and set forth the nature of its claim, interest in or lien upon the property herein described, if anythere be." (R. 25.)

The operating company came in, answered and made issue setting up its assessments (R. 71-72), and goes on to say in its answer:

"This defendant claims that by reason of the failure and refusal of the said stockholders and the said Portneuf-Marsh Valley Irrigation Company, Ltd., and these plaintiffs as pledged holders of the said stock to pay the assessments levied against the said stock, that the title to said stock, by reason of said sale, has passed to this defendant, together with a proportionate interest in the said irrigation system."

and asks for affirmative relief, namely: that its title to said stock be quieted in it (R. 73-74).

The trial court in its decree granted the prayer of the operating company to the extent of decreeing it a prior lien for these assessments so pleaded. To do this, as the opinion shows, it has taken into consideration and invoked in the operating company's favor every general statute of the State of Idaho relating to the power of a corporation to levy assessments upon its stockholders. Why is Section 3019 barred? In a controversy involving priority of liens, where the issue is thus made and decided, should not every statute of the State defining the respective priorities of the liens be equally applicable?

It is true that the respondents might have brought an action upon such of the pledged water contracts as were in default for the foreclosure of the lien and might in such suit have impleaded the operating company, requiring it to set up the nature of its claim; but in the suit at bar the operating company was the owner of the legal title to the irrigation works against which foreclosure was sought under the mortgage. It likewise claimed a specific lien upon the parcels of stock held in pledge by respondent trustees. The suit for the foreclosure of the mortgage and for the foreclosure of the pledge of the water stock: namely, this action, seemed the natural and proper place to test the validity of the defendant operating company's claim to an interest in the irrigation works. The latter was an indispensable party.

Even if it were possible that timely objection might have been made by the operating company to this method of testing the question involved, no such objection was made. The issues were framed, the cause was submitted, and judgment given in favor of the operating company upholding the priority of its lien as against the lien of

respondents. Under these circumstances, it is difficult to conceive why Section 3019, supra, Idaho Compiled Statutes, should not be considered as applicable the same as any other statute bearing upon the right of either party.

THE PRIORITY OF LIEN UPON THE WATER STOCK ACCORDED BY SECTION 3019, IF IT APPLIES AT ALL, APPLIES EQUALLY TO THE STOCK ACQUIRED BY THE RESPONDENTS THROUGH FORECLOSURE AND QUIT-CLAIM DEED.

With reference to the water stock which previous to this suit had been taken over by the respondents through individual foreclosure or quitclaim, the trial court in its opinion said:

> "But, however that may be, plainly the liens of the water contracts originally issued to the settlers have been fully extinguished, and the statutory provision under consideration could no longer have any application. • • • So that if we were to take the view of the statute contended for by the plaintiffs, there would be no lien superior to the right of the operating company under its assessment sales, for there is nothing at all due from the settlers to the promoting company or the plaintiffs, and neither it nor they have any lien at all by virtue of the water contracts, either superior or inferior." (R. 305).

It seems to us that in so deciding the trial court denied the respondents the benefit of the most usual and ordinary rules relating to the merger of a lien in a judgment or in title. True it is that by the foreclosure of the individual settlers' contracts and the consequent bidding in of the

property upon which the lien was held or through the analagous procedure of taking quitclaim deeds, there has been an extinguishment of the settlers' obligation to pay. But does it, or should it, follow that the priority of the lien by virtue of which the respondents acquired such title is thereby extinguished? It is a familiar principle in equity that a lien will not be considered as merged in a judgment or in a deed where the effect of such merger would be to validate a junior claim.

In the case of Factors & Traders Ins. Co. vs. Murphy, et al., 111 U. S. 738, 28 L. ed. 582, the Supreme Court of the United States says:

> "Where an incumbrancer, by mortgage or otherwise, becomes the owner of the legal title or of the equity of redemption, the merger will not be held to take place if it be apparent that it was not the intention of the owner, or if, in the absence of any intention, said merger was against his manifest interest."

Likewise in U. S. vs. Stowell, 133 U. S. 1; 33 L. ed. 555, it is held:

> Quitclaim deed by mortgagor to mortgagee passes only equity of redemption where the rights of a third party intervene.

The rule is thus stated in 19 R. C. L., 489, "Mortgages," Sec. 282:

> "Unless an intention to merge with knowledge of a junior lien or liens clearly appears, no merger results from the acquirement by the holder of the senior mortgage of the interests of the mortgagor, and the senior mortgage retains its priority as against all junior or intervening liens upon the mortgaged prop-

> erty; and this is true whether the interest of the mortgagor is the legal title to the land or the mere equity of redemption. It is only when the fee and the lien center in the same person, without any intervening claims, liens or equities, that a merger of the title and the lien will take place. Accordingly, when a trust deed creditor buys the trust subject and takes a conveyance therefor from his debtor, his lien is not thereby so merged in his estate as to make his entire estate in the land subject to an intervening lien; equity will preserve the trust lien for his protection."

Besides, it is expressly declared in Section XV of the trust deed (R. 52), that upon any default of the settlers' contract and the foreclosure thereof by the trustees, the trustees may become the purchasers at any foreclosure sale of the lands covered by any such water contracts, *"and thereupon said lands and waters shall become subject to the lien hereof (i. e. the trust deed) to the same extent as if said property had been specifically named herein."*

It would, therefore, clearly appear that such priority as is afforded the lien upon the water stock for the purchase thereof by the provision of Section 3019, Idaho Compiled Statutes, applies with the same force to the shares of stock foreclosed upon by the respondents or acquired by quitclaim deed as to other shares which in connection with water contracts were pledged with them as security for the bondholders.

And it seems superfluous to point out that these shares of stock and the water contracts having been pledged to respondents as security for the bondholders, that the plaintiffs have succeeded at least to all the rights of the construction company, and are entitled to assert at least any legal claim that the construction company might

assert. As we shall hereafter point out, the respondents are *legally and equitably* in a stronger position than the construction company.

We think, therefore, that the learned trial court was in error with respect to each branch of the reasoning set forth in the opinion as the basis for holding that Section 3019, Idaho Compiled Statutes, is inapplicable to respondents' lien; first, because the lien of the operating company was in fact "created or attempted to be created by the owner of the land," even if the second clause in the statute should be construed as a limitation on the general priority of lien asserted by the first and last clauses of the statute; secondly, because the court in this suit determined the relative priority of lien of the parties with reference to the stock in controversy and should take into consideration Section 3019 as well as any other statute bearing on the controversy submitted and decided. Thirdly, because the foreclosure of individual water contracts or the taking of quitclaim deeds did not result in a merger to the extinguishment of such prior lien as Section 3019 affords.

THE PRIORITY ADOPTED BY SECTION 3019 HAS NOT BEEN WAIVED BY RESPONDENTS.

The learned trial court, after concluding that Section 3019, Idaho Compiled Statutes, has no application to the controversy, for the reasons analyzed above, next concluded that even though this section of the statute were applicable, it has been waived by the contract between the State and the construction company (R. 250), and the articles of incorporation (R. 275) and by-laws (R. 278) of the operating company.

An analysis of the trial court's reasoning is as follows:

Even if Section 3019 were otherwise applicable, the benefits thereof have been waived on the part of respondents by the agreements and by-laws because:

(a) The State contract provides for organization of an operating company which may levy assessments.

(b) Settlers' water contracts provide for levying of assessments by the operating company.

(c) The by-laws provide that all issued stock should be subject to assessment, the only exception being stock held by the construction company before sold to the settlers and made appurtenant to the land.

(d) That by-law of the operating company, Section 8, Article 5 (R. 287) upon which respondents rely does not apply because:

(1) Ambiguous and therefore must be construed against them;

(2) This by-law refers only to

(a) Right to lien as provided by state contract and settlers' water contract;

(b) Right of construction company to assign water contract as in pledge;

(c) The right to vote stock under certain conditions as provided in the state contract and settlers' contract;

(d) Possibly other rights.

(3) The relation of the parties and importance of the matter preclude a construction of this by-law as covering the matter in controversy. (R. 305-309.)

We have thought it necessary to thus analyze and diagram the trial court's reasoning in order clearly to point out what we feel to be its error.

It is indeed true that the State contract and all of the pertinent documents recognize the right of the operating company to levy assessments upon the settlers for the maintenance and operation of the irrigation works. The cost of distributing the water to their lands could be met in no other convenient way. But the system having been completed and turned over to the settlers for operation and the distribution of the water among them for irrigation, it was by no means intended that the costs of the distribution of water for the benefit of the settlers should operate directly or indirectly to deprive the construction company or its assigns of the right to be reimbursed for the cost of building the system. The water contracts were sold to settlers on annual deferred payments. The purchasers by annual payment on the purchase price of their water rights gradually acquired an interest therein to the extent of such payments. We have no hesitancy in saying that the operating company can, by proper and valid assessments in accordance with the statutes, the State contract and its own charter and by-laws, impose assessments which by proper proceedings can be made to *divest the settlers' interest in such water rights.* That was the theory and intent of the machinery provided for the handling of Carey Act projects. Under the terms of the State contract the shares of stock of the operating company were, prior to sale by the construction company to the settlers (R. 260) to be "without voting power and to have no force or effect"; that is to say, prior to sale by the construction company to the settlers the shares were not to be subject to assessment at all; after such sale they were necessarily subject to assessment, the obligation to pay assessments being the obligation of the purchaser or

landowner. Upon the landowner's failure to pay the same, the operating company might, if it proceeded properly, impose a lien for assessments which might operate *to divest the settler of his contract interest.* The reasons which made the shares of stock non-assessable before sale to the settler apply with equal force to the preservation of the lien for the purchase price after sale. Being non-assessable before sale, the same considerations require that if after sale on a deferred payment contract it should be necessary for the seller to repossess them for default in payment of the purchase price they should again be not subject to assessment until resold. It seems to us clear beyond any doubt that by consenting to the assessment of the shares of stock for the necessary expenses of distribution of water after sale to the stockholder the construction company in no manner waived the priority of its lien.

On the other hand, it must be conclusively presumed that all the contracts, articles of incorporation, by-laws and pertinent documents *were entered into by the parties subject to and in the light of the priority afforded by Section 3019, Idaho Compiled Statutes.* We think it is a uniform conclusive presumption that parties contract and intend to contract with reference to and in subordination of pertinent statutes governing such transactions instead of in waiver of them.

But in this case the matter is not left to presumption. The State contract, which recites that the shares of stock after sale to the purchasers may be subject to assessment by the operating company (R. 260), provides expressly (R. 265):

> "That this contract is made and entered into by virtue of the provisions and subject to • • • the

> laws of the State of Idaho accepting the terms of the said Carey Act • • • and that such laws • • • are as much a part of this contract as if specifically herein set forth."

We think also that the charter of the operating company and its by-laws are clearly subject to and must be construed in connection with all applicable existing State statutes, including Section 3019.

But to make assurance doubly sure, the by-laws of the operating company were made to contain the following provision:

> "SEC. 8. *Shares Held Subject to Rights of the Portneuf-Marsh Valley Irrigation Company, Ltd.* All shares in this corporation shall be held subject to the rights of the Portneuf-Marsh Valley Irrigation Company, Limited, until the amount due to such company, its successors or assigns, shall have been fully and finally paid, as provided in the contract between said corporation and the purchaser of shares, and as provided in the contract between the said Portneuf-Marsh Valley Irrigation Company, Limited, and the State of Idaho." (R. 287.)

Section 5 of the same Article VIII of the by-laws provides for the levying of assessments, taxes or tolls, such assessments, taxes or tolls to be enforced by the *shutting off of the water of the user until such tax is paid.* (R. 285-286.)

Section 6 of the same article of the by-laws provides for statutory assessments; that is to say, assessments upon the stock under the general corporation laws (R. 286).

Section 7 provides expressly that the unissued stock of the operating company, until sold to settlers, shall not be subject to any tax, assessment or charge whatever.

Then comes Section 8 of the same article of the by-laws (R. 287), quoted above, which expressly preserves the priority of lien of the irrigation company for the purchase price of the shares as against any assessments that might be levied. Its juxtaposition to the sections relating to assessments and its general context precludes it from having any other meaning. It was written in the light of Section 3019, Idaho Compiled Statutes, and that statute is entitled to be added to it and read into it just as much as if it were written out at length as a part of this by-law.

The trial court held that this by-law is inapplicable to the controversy the same as the statute is inapplicable: first because it is ambiguous, and, therefore, must be construed against the respondents, pointing out (R. 305-306 *f.* 442), that the construction company prepared the State contract, the settlers' contract, the articles of incorporation, and the by-laws of the operating company.

In the first place we think these inferences and the force sought to be given them are unjustified by the record and by the statutes. The State of Idaho, through its Land Board, acting for the settlers, had at least as important a voice in the making of these instruments as did the construction company. Enough cases involving Carey Act projects in Idaho have come before this Court for it to know that all of these enterprises are cast in substantially the same mold; that is, forms prescribed and insisted upon by the State. Section 3030, Idaho Compiled Statutes, provides that the State Board of Land Commissioners (now the State Department of Reclama-

tion) shall prescribe suitable rules for the conducting and handling of Carey Act business. The State contract provides (R. 260) that the Articles of Incorporation of the operating company should be approved by the Attorney General of the State of Idaho. The settlers' contract (R. 125) provides on its face that it is made subject to the approval of the State Board of Land Commissioners, which approval must, prior to delivery, be endorsed thereon. The mortgage sought to be foreclosed in this action is one which, according to the terms of the State contract (R. 264-265) must be approved by the Attorney General of Idaho.

We think, therefore, that the counsel, in persuading the trial court that all of the pertinent instruments were fashioned by the construction company, and, in a sense, foisted upon the unprotected settler, are hardly justified by the facts and the record. The contrary is rather the case. The construction company was required to submit to forms and practice established by the State Land Board under rules applicable to this and all other Carey Act projects, and its assigns should not be held to have waived the protection of the Idaho laws to any further extent than is clearly shown by the instruments applicable.

The trial court next concludes that the section of the by-laws which respondents urge protects the priority of their lien relates to other matters and does not have the force and effect contended for by respondents; it relates in the trial court's opinion (R. 308), merely to "the rights of the construction company, as such rights were defined by the water contracts and the State contract, that is, the right of a lien as so defined, the right of the construction company to assign as in pledge, as provided in the

contracts, and the right to vote under certain conditions as provided in the contracts, and possibly other rights."

But the by-law was quite unnecessary to accomplish these objects. If such construction were put upon its meaning and intent, it might just as well have been omitted. "The right of lien" was imposed by the settlers' water contract and by the contract and State statutes. No by-law adopted by the canal company could possibly have interfered with it; likewise, "the right of the construction company to assign as in pledge" was expressly provided for in the settlers' water contracts (R. 130), in language as follows:

> "This contract may be assigned by the company and thereupon the payment of principal and interest as so provided shall be due and payable to the assignee."

The right of assignment would have existed, even without this express provision. In the same way the right of the pledgee to vote the stock under certain circumstances was expressly and fully defined in the settlers' agreement (R. 130-135); also in the State contract (R. 260).

The by-law was unnecessary to accomplish any of these things. We most earnestly submit that the construction company had each and every right specified by the trial court if the by-law had been omitted. But the by-law was obviously put there to protect the rights of the construction company and its assigns. Instead of being construed as a totally superfluous and unnecessary provision, it should, we think, be construed to accomplish the purpose that its context and position indicates. It is among the provisions of the by-laws relating to the assessments on stock. It follows that provision of the by-laws which

provides that the *unissued stock* shall not be subject to assessment, and it expressly states that all stock shall be held subject to the rights of the construction company until it had received its pay in full therefore. The rights referred to clearly mean its right to priority of lien.

The importance of this by-law is repeatedly emphasized and recognized in all the later documents and transactions. It is declared in the by-laws themselves to be irrepealable without the consent in writing of the construction company (R. 288-289). In the agreement made when the project was turned over to the settlers for operation the context of it was repeated (R. 159) and the operating company covenanted not to repeal it without the consent of the construction company in writing. Finally when the deed of conveyance from the construction company to the operating company was executed, it was again declared therein to be irrepealable and the language was again in the deed itself repeated "that all shares in said operating company shall be held subject to the rights of the construction company • • • until the several installments of the purchase price due the construction company, its successors and assigns, shall have been fully and finally paid." (R. 176.)

The shares in controversy are now claimed to be held by the operating company. If so, we insist that they are held subject to respondents' rights, as assignees of the construction company. According to that by-law, it makes no difference by whom the shares are held, whether by the stockholders of the operating company or by the operating company itself. They must and should be held subject to respondents' rights. In this controversy respondents ask that the appellant operating company be

compelled to give effect to its own by-laws. If its stock is now, through sales for delinquent assessments, "held" by it, the respondents require that it be so held, "subject to their rights" as assignees of the construction company until the amount due on the water stock "has been fully and finally paid." If the claim of the operating company is, as the trial court decreed, prior and paramount to that of respondents, the stock is not held "subject to the rights of the construction company and its assigns," but the rights of the construction company and of respondents, its assignees, are made subject to the rights of the operating company.

VALIDITY OF THE CANAL COMPANY'S ASSESSMENT

The argument so far has been devoted to a discussion of the priority of the assessments upon the assumption that they are *valid assessments*, but we shall now proceed to point out wherein the specific assessments asserted by the operating company are, in fact, void.

At the outset of this part of the discussion, it must be reiterated that, according to the by-laws of the operating company, there are two methods of assessments permissible: one method is set forth in Section 5, Article V, of the by-laws (R. 285). This method is in the nature of the imposition of a toll or service charge for the delivery of water. The method of notification and of enforcement of assessments of this nature is provided in that by-law. It requires notice of the assessment to be given by publication in a newspaper for a period of two weeks, and provides that in case of refusal to pay the assessment the board of directors may refuse to deliver water to the

holder of the stock until the assessment is paid. With respect to these tolls, charges or assessments provided for in Section 5 of the by-laws, the only method of enforcement and collection is by shutting off the water.

Section 6, Article V of the by-laws (R. 286), provides as follows:

> "SEC. 6. *Statutory Assessments.* In addition to the methods provided in these by-laws for raising revenue and money for the use of the company, the directors may levy assessments upon the stock of the corporation as provided by the laws of the State of Idaho, but no stock shall be regarded as issued within the meaning of such laws, unless the certificate therefor contains a description of the land to which such stock and the water to be delivered thereunder shall be applied and made appurtenant."

The above by-law was the section under which the assessments of the operating company asserted in this action were levied. They were sought to be enforced by publication of notice of delinquency and the sale of the stock, and the operating company claims title by virtue of such sales to itself. There is no pretense or claim that the assessments under which petitioner claims are other than "statutory assessments" levied under the general corporation laws.

Since, then, the operating company has sought to avail itself of the general powers of corporations to levy assessments as set forth in the Idaho Statutes, we contend generally that the assessments must be *under the statutes and in accordance with these statutes*, and not *in defiance of them*.

THE PRETENDED ASSESSMENTS WERE VOID BECAUSE IN EXCESS OF TEN PER CENT OF THE AMOUNT NAMED IN THE ARTICLES OF INCORPORATION OF THE PORTNEUF-MARSH VALLEY CANAL COMPANY.

The sections of the Idaho Statutes relating to assessments on stock of corporations are as follows:

> "SEC. 4733. *Directors May Levy Assessments.* The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, *and to the extent* herein provided.
>
> "SEC. 4734. *Limitation on Assessments.* No one assessment must exceed 10 per cent of the amount of the capital stock named in the articles of incorporation *except in the cases in this section otherwise provided as follows:*
>
> "1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount.
>
> "2. The directors of railroad corporations may assess the capital stock in installments of not more than 10 per centum per month, unless in the articles of incorporation it is otherwise provided.
>
> "3. The directors of fire insurance corporations may assess such a percentage of the capital stock as they deem proper."

The capital stock named in the articles of incorporation of the Portneuf-Marsh Valley Canal Company is 20,000 shares of the par value of $1.00 each, making the total capital stock named in the said articles of incorporation $20,000.00, of which ten per cent would be $2,000.00 (R. 276).

Defendants' Exhibits Nos. 1 to 16 (R. 178-250) show on their face that each of the pretended assessments under which the operating company claims its right was far in excess of the statutory limitation, the smallest of the assessments being fifty cents per share, which, based only on the issued stock (amounting to 11,582 shares, according to the allegations of paragraph 7 of the operating company's answer, R. 69), would yield $5,791.00.

It was stipulated at the trial in open Court that each of the assessments was in excess of the limitation imposed by the Idaho Statutes (R. 104).

> "MR. SNOW: May it be admitted that each one of the assessments referred to in these exhibits was in excess of ten per cent of the amount named in the articles of incorporation of the defendant Portneuf-Marsh Valley Canal Company?
>
> "MR. MCDOUGALL: Yes. And at the same time, I will ask for the admission that it was not in excess of ten per cent of the actual sale value of the shares of stock, which has been admitted to be $35.00 per share.
>
> "MR. SNOW: I think that may be admitted."

It is the contention of appellants that the pretended assessments, being from three to ten times larger than the statutory limitation, are absolutely void. It has been the contention of the operating company, on the other

hand, that the statutory limitation does not refer to limitations on the assessment of paid-up capital stock, but refers only to "calls" for unpaid installments on subscribed capital stock, and secondly, that if the limitation does refer to assessments on paid-up capital stock, the excessive assessments are not void, but merely irregular.

As to the first contention, the statute quoted above seems to be as clear as language can make it, that the ten per cent limitation applies only to assessments upon paid-up capital stock. The second subdivision of Section 4734, Idaho Compiled Statutes, expressly permits assessments or "calls" upon unpaid capital stock to be "for the full amount *unpaid* on the capital stock." In other words, it is one of the three exceptions to the general limitation. In a matter so clear the quoting of authorities would seem to be superfluous. Nevertheless, authority is not lacking.

The California statutes relating to assessments upon corporation stock are identical with those of Idaho quoted above (California Civil Code, Sections 331 and 332). In the case of Brown vs. San Gabriel River Rock Company, 22 Cal. App. 682, 136 Pac. 542, it is said:

> "Under the express provisions of Civil Code, Section 332, corporation stock may be assessed to pay debts without reference to whether it is paid up or not, the only difference being that paid-up stock is only subject to the extent of ten per cent in any one assessment, while the unpaid stock may be assessed for the full amount unpaid thereon."

The Court will, of course, keep clearly in mind that as to the operating company itself the stock was at all times

fully paid up. The construction of the irrigation works was the full consideration for all of it. We will presently discuss this in detail.

Since it is clear, therefore, that the statutory limitation applies to assessments made in the case at bar, we come to the question of whether such assessments are void or merely irregular. The general rule is that a corporation, in the absence of statutory authority, has no power to levy assessments on paid-up capital stock, and that where there is such statutory authority to levy assessments on fully paid capital stock and collect the same by forfeiture and sale of the stock for delinquent assessments, the power to levy assessments and sell the stock must be exercised strictly in accordance with the mode prescribed by statute. In the case of Cochran vs. Sonora Mining Company, 8 Ida., at page 661, the Court says:

> "All the authorities to which our attention has been called hold, not only a substantial, but a strict compliance with the statute must be had, or the sale is void."

And again on rehearing of the same case, it is said (8 Ida. 664):

> "In case of the levy of an assessment by a copora-tion and proceedings to sell stock on account of delinquency in paying such assessments, the proceeding is a special, summary one by which citizens are deprived of their property; and, in order to make the sale valid, all of the requirements of the statute must be substantially complied with:

The above case quotes with approval I Cook on Corporations, 4th edition, Section 129, where it is said:

"The general method of forfeiting shares for non-payment of calls is usually prescribed in detail by the statute authorizing the forfeiture. In the earlier cases there may be observed some tendency to hold that a substantial, in distinction from a strict, compliance with the requirements of the statute, is all that is necessary to a valid forfeiture. But in later cases, English and American, it is plainly disclosed, and it may be taken as a settled rule, that the validity of the forfeiture and sale of the shares of a subscriber in arrears depends upon a strict and formal compliance with the requirements of the enabling statute."

In the case of Pacific Fruit Company vs. Coon, 107 Calif. 447, 40 Pac. 543, it is said:

"The (trial) court further found . . . that said assessment exceeded ten per cent of the whole capital stock named in the articles of incorporation, and greatly exceeded the indebtedness of the incorporation; and further found, as a conclusion from the foregoing facts, 'that said pretended assessment was not levied in accordance with the laws of the State of California,' and therefore was void. . . . If this finding is justified by the evidence, the judgment and order should be affirmed, since an assessment of $5.00 per share on 8,295 shares amounts to $41,475, which exceeds 10 per cent of the whole capital stock named in the articles of incorporation by $16,475, contrary to Section 332 of the Civil Code, which provides: 'No one assessment must exceed ten per cent of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for . . .'"

In Thompson on Corporations, Second Edition, Volume 4, Section 4815, it is said:

> "Statutes authorizing assessments on corporation stock are in derogation of the common law and are strictly construed and are not to be extended beyond the plain meaning and import of their terms. It is a rule of frequent application that assessments can only be levied and enforced in strict compliance with the statutory requirements • • • Where assessments to a certain amount are authorized either by statute or by charter, a corporation cannot levy an assessment in excess of the amount specified."

The North Dakota statutes relating to assessments on capital stock of corporations were taken verbatim from California, as were the Idaho statutes.

In the case of More vs. Courier News, 29 North Dakota 385, 151 N. W. 2, there is a full discussion of these sections of the California and North Dakota laws, and the decisions construing them. The Court says:

> "We have already set forth Section 4571, under which this limitation is claimed, and it is apparent that no assessment must exceed 10 per cent of the amount of the capital stock named in the articles of incorporation, except in the cases otherwise provided • • • The words • • • seem to be susceptible of one meaning."

In the case of Great Falls & Conway Railroad Co. vs. Copp, 38 N. H. 124, the Court says:

> "No assessment can be made on the stockholders of a road beyond what the charter provides for or the law applicable to the subject authorizes, and all

> assessments assumed to be made which would not come within such authority are invalid."

See also State vs. Morristown Fire Assn., 23 N. J. Law, 195.

It seems, therefore, from the foregoing (there being no authority to the contrary under similar statutes of which the writers of this brief are aware), that the assessments in question were illegal and void and that all proceedings for the enforcement thereof were a nullity.

The trial court in its decision failed to discuss the matter of the invalidity of the assessments on the ground that they were excessive, although the matter was urged with emphasis. It was of the opinion that the various contentions relating to the invalidity of the assessments must fail, on account of Section 4749, Idaho Compiled Statutes, which provides:

> "SEC. 4749. *Actions to Recover Stock Sold.* No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect in the notice of sale or in its publication, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid or be due thereon, and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced within six months after such sale was made."

The inapplicability of the above section to assessments if invalid because they are excessive is apparent. If a

party whose stock is sold under an invalid, excessive assessment should have to first pay or tender to the corporation the sum for which the stock was sold, being the amount of the excessive assessment, together with all subsequent excessive assessments which might have been levied, with interest thereon, no remedy whatever would be provided for the unlucky stockholder, and the statutory limitation on assessments would be a gruesome joke. Prior to the decision of the learned trial judge, it had been uniformly held by all courts that the statute last quoted applied to mere minor irregularities and not to assessments inherently invalid.

In the case of Wall vs. Basin Mining Company, 16 Idaho 314, it was held that the assessment was invalid because the stock certificates contained the words "fully paid and non-assessable," constituting an enforceable contract between the corporation and the stockholder who held such stock.

The Court there expressly held that such assessment was not irregular, but void, and that the provisions of Section 4749, Idaho Compiled Statutes, supra, did not apply.

In the case of Mantle vs. Jack Waite Mining Co., Limited, 24 Idaho 613, there was a provision in the contract between the promoters of the corporation and the corporation itself, that the promoters' stock was assessable up to 25 cents a share before any other stock of the company was subject to assessment. An assessment having been levied on the other stock in breach of this provision, it was again held that the assessment was void and that the provisions of Section 4749, supra (referred to therein as Section 2766 of the former State Code, being identical

with the present Section 4749, Idaho Compiled Statutes), did not apply.

In the case of Cheney vs. Canfield, 158 Calif. 342, 111 Pac. 92, the pretended assessment there under consideration had been levied at a meeting of a board of directors, irregularly called and held. The Court said, with reference to Section 347 of the California Civil Code, which is practically identical with Section 4749 of the Idaho Compiled Statutes:

> "The sections referred to only apply where there has been some irregularity in the assessment or irregularity or defect in the notice of sale, or the sale itself. The assessment in question here, as we have seen, was not merely an irregular assessment; it was absolutely void."

In the case of Herbert Kraft Co. Bank vs. Bank of Orland, 133 Calif. 64, 65 Pac. 143, the Court said:

> "This is not an action to recover the stock sold; neither is the action for the purpose of recovering damages for its conversion. Section 347, Civ. Code, applies only where the action is for the recovery on the ground of irregularity or defect in the notice of sale, or defect or irregularity in the sale. The assessment in this case was not an irregular assessment merely, but a void one. If one-fourth of the capital stock had not been subscribed, the defendant bank had no power to levy the assessment."

See also Kohler vs. Agassiz, 99 Calif. 15.

Nor is this case an action to recover the stock sold or damages for its conversion. As is clearly set out in the trial court's opinion, the operating company does not claim the absolute ownership of the stock in question,

nor does the court's decree establish such ownership. The operating company merely claims and was decreed a lien on the stock by virtue of its pretended assessments and the proceedings for the enforcement thereof, and the proceedings in this case merely relate to the priority of the parties' respective liens.

It is respectfully submitted that the operating company's pretended lien, being based upon an assessment admittedly in defiance of the state statutes, and therefore void, must be a nullity.

AS TO THE CONSTRUCTION COMPANY AND ITS ASSIGNS, THE STOCK ON ITS FACE IS "FULL PAID AND NON-ASSESSABLE."

The stock certificates show on their face that as to the construction company or its assigns, the stock is full paid and non-assessable. The stock of the operating company was originally issued to the construction company fully paid as the consideration for the construction of the irrigation works (State contract, R. 260). With respect to that company, both under the State contract, the by-laws of the canal company and the construction company, it was "Full paid and non-assessable." When the certificates were originally issued they were so marked plainly on their face.

Under the laws of Idaho, the issuance of stock marked "full paid and non-assessable" to a party constitutes a contract making the stock non-assessable (Wall vs. Basin Mining Co., 16 Idaho 314; Mantle vs. Jack Waite Mining Company, Limited, 24 Idaho 613).

The trial court inquires (R. 310) whether in view of the articles of incorporation and by-laws permitting as-

sessments, the words "full paid and non-assessable" appearing on the "decorative border" of the stock certificate was not a "joker." After making such inquiry, it concludes that the form of stock certificate was not an evidence of bad faith, but that the words "full paid and non-assessable" merely meant that the stock was fully paid and was not subject to calls for the installments of the purchase price. We think the trial court was misled into entirely misconceiving the purpose and intent of the words "full paid and non-assessable" as printed on the stock certificate. As originally issued, to-wit: issued to the construction company in payment for the construction of the works, they were full paid and also non-assessable for all purposes. That much at least is conceded by petitioner.

The contract with the settler was not a contract with the corporation issuing the stock, but a contract evidencing the *resale of the stock*. In the hands of the construction company or its assigns it was indeed full paid and non-assessable, and so intended to be. In reselling the stock to the settler, the settler agreed in the contract of purchase that it should be, while the settler was enjoying the benefits of the stock, subject to assessment in the manner in the settlers' contract prescribed for the expense of distribution of water and maintenance and operation of the system. The articles of incorporation and by-laws of the operating company sought to give effect to this limited right of assessment while in the hands of the settler in accordance with the general theory underlying the whole arrangement. But it was a limited right of assessment only.

The stock as held in pledge by the construction company remained, so far as its lien was concerned, "full paid and non-assessable." When it was pledged to respondents, they had a right to rely on the words, "full paid and non-assessable," placed thereon as part of the contract. We know of no principle of law under which the bondholders or the trustees acting for them were charged with constructive notice of the by-laws of the company, even if the by-laws at the time or subsequent thereto sought to make the stock generally assessable in the hands of everyone.

STOCK IN TREASURY OF THE CORPORATION CANNOT BE ASSESSED

Attached to the operating company's answer as schedule "B" (R. 78) is a list showing the total amount claimed to be owing as delinquent assessments from the various parcels of stock. As shown by the testimony of the Secretary of that company (R. 100-101; 107), these charges upon the several parcels of stock are computed on the basis of showing the original delinquent assessment plus costs and 20 per cent penalty, and to this has been added, to make the total lien claimed the amounts of the various assessments levied subsequent to the time when, as claimed, the operating company became the owner of the stock at the original sale to it for delinquent assessments. It clearly appears that the bulk of these charges are made up of assessments levied while the stock was treasury stock of the operating company. According to the testimony of the secretary of the operating company, there has been no delivery of water on this stock after it became originally delinquent (R. 108). Certainly there can be no valid

statutory assessments on the stock held in the treasury of the corporation. It would hardly seem, either, that valid assessments in the nature of tolls or service charges could be levied against this stock which was in the treasury of the corporation. This stock, according to the operating company's theory, was not entitled to demand or receive water; and, according to the testimony, it actually received no water.

ALL ASSESSMENTS LEVIED BETWEEN THE 2D DAY OF DECEMBER, 1918, AND THE 14TH DAY OF SEPTEMBER, 1921, ARE VOID, BECAUSE THE OPERATING COMPANY WAS DURING THAT PERIOD A DEFUNCT CORPORATION.

On the 2d day of December, 1918, the charter of the operating company was forfeited by failure to pay corporation license taxes, or, in failure in lieu thereof, to file with the Secretary of State an annual statement showing such corporation to be exempt from the payment of tax (R. 149). From that period until the 14th day of September, 1921, the operating company was a defunct corporation, at which later date it was reinstated, in accordance with the statutes, after compliance with the necessary conditions for reinstatement (R. 148; also 104).

While it is true that the operating company was, in the year 1921, reinstated, it is provided by Section 4787, Idaho Compiled Statutes:

> "The rehabilitation of a corporation under the provisions of this chapter shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture."

It ought hardly be necessary to cite extensive authority that on the lapse of a corporation's charter, the legal power of its officers and directors cease. It is true that under the Idaho Statutes the directors, as trustees for the defunct corporation, may act for it in winding up its affairs; but only with respect to winding up its affairs. Certainly the levying of assessments by a board of directors for distributing water and carrying on the usual business, acting entirely without authority of the law, and indeed under circumstances where their acts under the statute (Section 4789, Idaho Compiled Statutes) constitute a misdemeanor, cannot be held to afford the basis for a valid subsisting lien on the stock of the corporation. Between December, 1918, and September, 1921, all acts and proceedings as to assessments were entirely void and without effect.

Fletcher Cyc. Corporations, Vol. 8, Sec. 4468;
Houston vs. Utah Lake, Land, Water & Power Co., 55 Utah 393, 187 Pac. 174;
Aalwyns Law Institute vs. Martin, 173 Cal. 21, 159 Pac. 158;
Ransome-Crummey Co. vs. Superior Court, 205 Pac. 446;
Sharp vs. Eagle Lake Lumber Co., 60 Cal. App. 386, 212 Pac. 933.

THE ORDERS LEVYING THE ASSESSMENTS ARE INVALID ON OTHER GROUNDS

Section 4736, Idaho Compiled Statutes, provides:

"The order levying an assessment must specify the amount thereof, when, to whom and where payable; fix the day subsequent to the full term of publication

> of the assessment notice, on which the unpaid assessments will be delinquent, not less than 30 nor more than 60 days from the time of making the order levying the assessment; and a day for the sale of delinquent stock, not less than 15 nor more than 60 days from the date the stock is declared delinquent."

An examination of the defendant's Exhibits 1 to 16, inclusive (R. 178-250), clearly shows that the provisions of the statute have in no respect been complied with. As to the assessment of February 23, 1915 (Defendant's Exhibit 1, R. 178), there is in evidence no order of the board levying the assessment.

Counsel for the operating company admitted in open court, upon objection to the introduction of evidence as to the sale proceedings based on the last mentioned assessment, that the operating company was unable to find "any minutes of the board meeting at the time it recites that the assessment was levied," but that the notice of sale and notice of delinquency are offered "for what they are worth." (R. 105.)

The trial court nevertheless held this to be a valid assessment the same as the others!

In only a few of the orders levying the assessment is any date of delinquency specified at all, and in all the orders of assessments in which the date of delinquency is specified (with the exception possibly of Exhibits 7 and 8, R. 210, 213), the date of delinquency is not in conformity with the statute. Moreover, with respect to the assessments shown in Exhibit 8, to-wit: that of September 2, 1919 (R. 213), not even the amount of the assessment is specified. Exhibit No. 9 (R. 218) shows a pretended assessment in which the order fixes neither date of pay-

ment, date of delinquency, nor date of sale, or when, to whom, or where the assessment is payable.

Nevertheless, the trial court declared all these assessments valid and directs their payment, whether, in fact, there is any evidence of an assessment or not, or whether the amount of the assessment is specified or not.

THE ARGUMENT OF PETITIONER'S BRIEF

In the preceding portion of this argument, we have discussed those points dwelt upon by the trial court in his opinion and which are not covered by petitioner's brief in this Court. It has seemed necessary to respondents to do this, because the trial court adopted apparently in toto the persuasive contentions of petitioner and set them forth in a voluminous opinion. Many points covered in this opinion are in no manner discussed by petitioner's brief before this Court, and our only opportunity of attentively analyzing all of petitioner's contentions has been to discuss them consecutively in the order set forth in the opinion. We will now discuss the argument of petitioner's brief in this Court. Petitioner argues as follows:

(1) That the federal Carey Act statute (29 Stat. at large, 413) in itself does not create any lien in respondents' favor.

As to this respondents agree. The only significance of the federal statute is the aid it may give in the interpretation of the state statute. The state statute was enacted under the authority and in pursuance of the plan set out in the federal statute, and the federal statute indicates

the general theory and intent of protecting the investment of those reclaiming Carey Act lands.

> (2) That the state statute, Section 3019, Idaho Compiled Statutes, in itself imposes no lien independent of the settlers' water contract.

To this we also agree. The significance of the state statute is also, of course, only that it defines the purpose, extent and priority of the lien which is imposed by the settlers' water purchase contract.

> (3) Petitioner argues that the basis of respondent's lien is the settlers' water contract solely; that this lien is in form an ordinary mortgage governed by the laws of Idaho.
>
> "Upon any default on the part of the individual contract holder the construction company had the right to foreclose its mortgage on the water and the land. If it foreclosed its mortgage and obtained title to the water and the land through that means, then it stepped into the shoes of the individual who had previously owned it." (Petitioner's Brief, 40-41.)
>
> "It follows that, as counsel for petitioners view the case, the Court is not called upon to construe Section 3019, Idaho Compiled Statutes." (Petitioners' Brief, 44.)

These seem to us naive contentions.

In the first place, the mere form of the lien (i. e., that it is in terms a mortgage) would seem to have no bearing on the question of its priority as defined in Section 3019. Whatever form the lien took, it would seem that Section 3019 or any other pertinent statute must be read into it as part of the contract.

In the second place, we have always thought that under the laws of Idaho or any other state, a mortgage lien relates back to the time of its creation so as to cut off intervening rights. A mortgage does not "step into the mortgagor's shoes" at the time of the foreclosure. But on the other hand he acquires whatever rights the mortgagor had at the time of the creation of the mortgage lien.

This is so apparent that we must assume that petitioner's contentions in this regard must not be taken literally as applying to secondary liens in general, but as applying only to the burdens of liens of stock assessments which accrued subsequent to the stock purchase.

Viewed in this light, petitioner's contention is based in part on the premise that by sale to the settler the stock became inseparably and unalterably appurtenant to the land. The premise is faulty if it were material. Such is not the law as construed by the Supreme Court of Idaho.

In the case of Bennett vs. Twin Falls etc. Co., 27 Idaho 652, the Idaho Court was construing a Carey Act settlers' water purchase contract which contained provisions making the water appurtenant to the land identical with the language of the settlers' contract in this case and upon which language counsel here relies. The Court there said:

> "It is evident from the provisions of the settlers' contract that the purpose was not to make an absolute conveyance of the water right to the plaintiff's predecessor, since it provides, among other things, that no water shall be delivered to the purchaser from said irrigation system while any instalment, principal or interest is due and unpaid from the purchaser to the company. The state contract provides that pending the fulfillment of the contract between the entryman and the Land & Water Company, the

> entryman may have the right to the possession and and enjoyment of the water right, and the entryman's contract also provides that if he does not comply with the terms of his contract, he is not entitled to the right to the enjoyment or the possession of such water, nor can it reasonably be urged that the title of the water right passes to the purchaser upon the execution of his contract with the Land & Water Company, for in the present case, as well as in practically every Carey Act project, there was no water right in existence at the time of the execution of water right contracts. There is nothing in the contract to vest the water right in the entryman unless he makes payment for the same, or that makes the water right appurtenant to any land."

But for the purpose of further analysis of petitioner's argument, let us waive the faulty premise and assume that the water was made inseparably appurtenant to the land and was mortgaged to the construction company as such appurtenance. Let us leave out of consideration Section 3019 and examine the applicable mortgage laws of Idaho.

So far as the water right is concerned, the settlers' contract created a purchase money mortgage.

Water rights in Idaho are real property or real estate.

> Section 3056, Idaho Compiled Statutes.
> Nelson vs. Parker, 19 Ida. 727.
> Clark vs. Paddock, 24 Ida. 142.

This is true of the water rights sold by Carey Act construction companies to Carey Act settlers under contract.

> Bennett vs. Twin Falls, etc. Co., 27 Ida., at page 651.

Section 6351, Idaho Compiled Statutes, provides as follows:

> "A mortgage given for the price of real property at the time of its conveyance has priority over all other liens created against the purchaser subject to the operation of the recording laws."

Here the language is that the purchase money lien shall have priority "over all other liens created against the purchaser." This language quite precludes any specious contention such as petitioner makes with respect to Section 3019, Idaho Compiled Statutes, supra, that the lien is prior only to those arising from the direct voluntary act of the purchaser.

This brings us to what we think is a controlling aspect of this case. With respect to the water right, respondents' lien is a purchase money mortgage and should be governed by the equitable principles generally applicable to such liens.

> "A mortgage given for the unpaid balance of purchase money on a sale of land simultaneously with a deed of the same and as part of the same transaction is entitled to the highest consideration of a court of equity and takes precedence of prior judgments and all other existing and subsequent claims and liens of every kind against the mortgagor to the extent of the land sold."
>
> 41 C. J. 528, Sec. 470.
>
> "A purchase money mortgage is what the term implies and is predicated on the theory that on the simultaneous execution of the deed and mortgage the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and without stopping rests in the mortgagee. It

follows, therefore, that no lien of any character can attach to the title of the mortgagee."

Keith vs. Cropper, 196 Iowa 1179.

This is the doctrine of instantaneous seizin. The title does not stop beneficially in the purchaser, but rests always in the mortgagee. Dower rights, and homestead rights do not attach. Liens against the purchaser prior in time even to the purchase money mortgage are cut off.

Kneen vs. Halin, 6 Ida. 621.

In the hands of the construction company, the water stock sold to the settler was subject to no assessments. The same sort of title or interest in the irrigation works which the construction company held was the interest to which its lien attached. That is, a non-assessable interest. No intervening lien created by or against the purchaser voluntarily or involuntarily on his part could intervene to cut off the vendor's rights.

We have followed the third subdivision of petitioner's argument, not vouching for its soundness. We do not, of course, agree with counsel that Section 3019, Idaho Compiled Statutes, need not be considered by the Court in determining the issue here presented. We think, on the other hand, that Section 3019 is the controlling statute. We merely point out that if, as petitioner contends, respondents' lien is governed by the Idaho Statute relating to purchase money mortgages, petitioner's petition is no whit improved. In avoiding Scylla petitioner runs upon Charybdis. Section 6351, Idaho Compiled Statutes, relating to purchase money mortgages, should be considered in pari materia with Section 3019 as indicating the nature of the lien contemplated by the Legislature. Carey

Act construction companies under the statutes relating to such enterprises were authorized to create and build property and sell interests therein for their reimbursement. The lien upon the property so sold is and should be at least of equal dignity with that of a purchase money mortgage as applied to the facts of this particular case.

THE CLAIM THAT RESPONDENTS HAVE NO HIGHER RIGHT THAN THE CONSTRUCTION COMPANY.

Petitioner's brief reiterates to the point of tedium that respondents have no other or higher rights than the construction company; and it repeatedly urges upon this Court's attention a sentence from respondents' brief quoted in the trial court's opinion indicating that such was the respondents' own contention before the trial court. But that such has not in fact been respondents' position before the trial court or elsewhere is shown in other parts of the trial court's opinion. For instance, in discussing one point the trial court said:

> "There is nothing in the suggestion touching this point that the plaintiffs have a right superior to that of the construction company . . ."
> (R. 311, f. 451.)

In one aspect of the case especially, which was disposed of by the trial court in accordance with the view of counsel for the operating company, it is felt that proper weight is not given to the position of respondents as mortgagees under a mortgage on the entire irrigation works authorized in the year 1908 and given and recorded in 1909 while these works were still in process of construc-

tion and long before they were turned over to the operating company for operation.

Section 5639, Idaho Compiled Statutes, provides as follows:

> "SEC. 5639. *Consumer's Title Not Affected by the Transfer of Ditch.* When any payment is made under the terms of a contract, by means of which payment a perpetual right to the use of water necessary to irrigate a certain tract of land is secured, said water right shall forever remain a part of said tract of land, and the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch property or by any foreclosure or any bond, mortgage or other lien thereon; but the owner of said tract of land, his heirs or assigns, shall forever be entitled to the use of the water necessary to properly irrigate the same, by complying with such reasonable regulations as may be agreed upon, or as may from time to time be imposed by law. And said payment for said water right shall be a release of any bond or mortgage upon the canal property of the person or company from whom such right is purchased or their successors or assigns, to the amount of such water right thus purchased and paid for • • •"

Since obviously under this section a mortgage upon an irrigation system in Idaho is inoperative with respect to subsequent sales of water rights made by the owner of such works to the extent of payments received by the owner thereon, a safeguard was sought to be provided by an arrangement in the trust deed permitting sales of water rights by requiring the sales agreements to be deposited with the trustees for the bondholders in an amount of par or face value of such water purchase agreements

equal to one and one-half times the principal of the outstanding bonds (R. 38-39). These provisions were quite certainly inserted in the trust deed in special view of Section 5639, Idaho Compiled Statutes, supra. Excepting only to the extent of rights acquired by actual settlers through payments on the purchase price of the water rights, the trust deed was in all respects an ordinary mortgage on the entire corpus of the property. The rather unusual provisions of the trust deed in this respect were only in the interest of settlers who actually paid, and in the interest of the mortgagees on account of the rights of such settlers under Section 5639. These provisions were not, we submit, intended to permit intervening liens of third parties.

The trust deed further provided that if upon default in payment by the settlers who purchased water rights the trustees foreclosed upon the water contracts deposited as collateral and bid in the property at sale, then "the lands and water become subject to the lien hereof (i.e., trust deed) to the same extent as if said property had been specifically named herein" (R. 52). It seems clear to us, therefore, that the mortgage, subject only to the right of each individual settler to the extent of his payments upon his purchased water right, covers the irrigation works and water rights in their entirety. That this general mortgage lien upon the corpus of the entire property dating at the latest from November 27, 1909, the date of record of the trust deed, precluded any later adverse claim of the operating company. Nothing that either the settler, the operating company or the construction company might do in their dealings with each other might or could alter the mortgagees' then fixed rights.

In many western states mutual cooperative irrigation companies unconnected with the Carey Act have given mortgages upon their irrigation systems. The stock of these companies is usually subject to assessment or tolls for operation and maintenance. It would be a novel principle if these mortgaging corporations could, through the simple process of sales upon their own delinquent stock assessments, divest a mortgagee of a prior mortgage lien on the irrigation works on the theory that either the express or the implied right of assessment on the stock of such company arising out of the desirability or the necessity of operating this class of property was a right superior to the mortgage lien on the system. The mortgagee may know that the stock is subject to assessment and that any stockholders' right may be divested by appropriate proceedings. But that would not and should not affect the underlying mortgage.

THE EQUITIES IN GENERAL

The trial court, in following the contentions of petitioner and failing to give effect to the numerous state statutes which respondents invoked for the protection of their rights, was evidently strongly moved by its conception of the equities of the conflicting claims.

The opinion (like petitioner's brief in this Court) dwells on the characteristics and functions of the construction company as a "promoting company with hope not groundless of large profits" (R. 296) and (R. 298), "it is to be inferred that directly or indirectly the construction company is under the control of the plaintiffs as trustees, and such moves as it makes are actuated under their direction."

We earnestly submit that the scattered bondholders of the eastern and middle western states whom the respondent trustees represent, have in no sense a speculative or "promotion" claim. The dollars they are seeking to realize out of this foreclosure of mortgage and pledged property are honest investment dollars, the full value of which went into the creation of the irrigation works which the settlers are enjoying. They had no hope of profit except the 6 per cent interest which the bonds bear, and which interest they have not received for many years. The mortgage invoked for the security of their rights was put upon the irrigation works before they were built; their money created the property in controversy. It has always been supposed that the state and federal statutes which, in accordance with public policy, encouraged the reclamation of arid lands of the west, gave them a prior lien on the property created for the return of their money with the moderate interest thereon. Their position in seeking the return of this money as a prior lien does not seem "harsh and inequitable." On the other hand, it seems to us harsh and inequitable that after creating the irrigation works, they should be assessed out of their compensation therefor.

Under the terms of the State contract, the shares of the operating company held by the construction company were to be of "no force or effect" until sold to settlers. Every settler who filed upon the land knew, therefore, or was charged with notice, that the unsold shares of stock and that interest in the irrigation works represented by unsold stock was not subject to assessment for the operation and maintenance of the system. The construction company and its successors received no benefits of the

distribution of water and should not share the burden of the distribution of water. It does not seem to us harsh or inequitable, but rather in harmony with the well understood general intent of the enterprise, that after sales to settlers were attempted to be made, to-wit: after contracts of sale were entered into which were not lived up to by the settlers, and which resulted in the repossession of the property by the assignee of the seller, that such property and the shares of stock represented by it should still be in the same status as before sale—that is, neither receiving any benefits from the delivery of water nor subject to assessments for the delivery of water.

The construction company, under its contract with the State, was compelled to sell to any qualified entryman of land (R. 257). It could not pick its financial risks. Less than 10 per cent of the purchase price of the water shares were payable in cash, the balance on long deferred payments. The settlement of the project was fostered by these liberal terms of contracts of sale. The natural result was the more rapid settlement of the project and the bringing in of other settlers to share in the maintenance of the irrigation works and charges for distribution of the water. But there were bound to be defaults and foreclosures. Under these circumstances, it seems to us harsh and inequitable, where the sale was unsuccessful and never consummated, that the shares once contracted to be sold, whether water was ever delivered under them or not, and after repossession by the seller and awaiting another sale, should perpetually be subject to maintenance assessments. The respondents freely concede that to the extent that the *purchaser* has any equity by reason of

payments made, such equity would be subject to the operating company's lien for maintenance.

Consider for a moment the effect of petitioner's contention. Irrigation works under the Carey Act are always built upon plans and specifications carefully gone over, scrutinized and agreed upon between the construction company and the State. Irrigation systems are not always ideal structures. There is a wide variance in their character. The price fixed for the sale of water rights depends upon the plans and specifications, which determine the expense of the construction of the system. An ideal ditch would be one lined with cement, having concrete headgates and weirs. Generally no such system is specified in State Carey Act contracts. Earth ditches with wooden headgates and structures are more often first built, generally sufficient for a time, and more in keeping with the settlers' ability to pay the price. There must be an initial relation between the cost of reclamation and the value at the time of the land reclaimed. In the same way dirt roads precede asphalt pavements. The latter follow the former with the increase in value of the adjacent property.

But if the settlers are at liberty to assess the stock for improvements and betterments and make such assessments a prior lien to that of the original purchase price of the water shares, then the plans and specifications in the State contract mean nothing. The settlers can force the construction company or its assigns to build any sort of improvements or betterments they desire. They need only levy assessments on the unpaid stock for betterments and improvements. Ditches can be concrete lined, steel flumes put in and concrete headgates installed; if the lien

of assessments becomes prior to the statutory lien of the construction company and the mortgagees, the latter must pay the delinquent assessments or forfeit the stock, and this process may be repeated indefinitely. In each case the money would go into the treasury of the settlers' company for the building of an irrigation system entirely different from that originally specified in the State contract.

Even in case the respondents had paid these assessments, they would have no way to be reimbursed upon foreclosure of the individual water contract liens they held. Section 3023, Idaho Compiled Statutes, provides that upon sale of the property to satisfy the purchase price lien:

> "No person * * * or company owning and holding any lien shall bid in or purchase any land or water right at a greater price than the amount due on said deferred payment for said water right and land, and the costs incurred in making the sale of said land and water right."

The succeeding sections of the statutes (Secs. 3025-3028) provide that any qualified Carey Act entryman, a stranger to the transaction, may redeem from the foreclosure sale for the amount bid, thus obtaining the benefits of the payments the prior purchaser had made. Whenever the respondents are obliged to foreclose a water contract lien against a settler and through foreclosure again obtain possession and ownership of the stock, it is to all intents and purposes unissued stock of the corporation until resold again to a purchaser or a landowner. Then it again becomes subject to assessment and such new purchaser's interest may in turn be divested

by appropriate and valid proceedings of the operating company in connection with its assessments, tolls or charges for water service. But these proceedings should not be held to affect respondents' prior lien until it has finally obtained through *consummated* sale the purchase price for such shares. As stated in repeated decisions of the Supreme Court of Idaho, the construction company or any assignee of its rights, are simply trustees for future settlers. (State vs. Twin Falls, Salmon River Company, 30 Idaho 41, at page 59). With regard to water stock that has once been sold and is now repossessed, the construction company and the respondents, as assignees, still occupy that trustee capacity. Only qualified entrymen can enter Carey Act land. The irrigation company and the trustees are powerless to file upon and farm the land and utilize the water. The land and water stock must be held until some other settler buys it.

Consider those shares of stock held by respondents which are appurtenant to unpatented Carey Act lands which have been cancelled by the State upon the application of the operating company (R. 164, 165). There the operating company took the initiative in causing to be cancelled the entries of a large number of settlers for their failure to comply with the rules and regulations of the State Board Commissioners with respect to cultivation and residence; its own activity resulted in the cancellation of these entries. As a practical matter, the cancellation of these Carey Act land entries has resulted in eliminating the delinquent entrymen and cancelling the sale of the stock. Surely this stock, while awaiting resale, should be considered as simply unsold stock. There is no land upon which it can be used for irrigation. While

the water stock on its face makes the water right appurtenant to such land, it is not so in fact. The land is unentered Carey Act land belonging to the State of Idaho. If this stock, put in such a position through the activity of the operating company, is in fact subject to perpetual assessment while awaiting resale, it puts what seems to be a heavy, unexpected and inequitable burden upon the bondholders. The operating company renders no service with respect to the distribution or use of the water represented by this stock, and it should not, in any equitable view, be subject to service charges.

SHOULD THE OPERATING COMPANY BE DECREED AN EQUITABLE LIEN FOR THE AMOUNT OF ITS ASSESSMENTS, IRRESPECTIVE OF THEIR VALIDITY?

The trial court in its opinion strongly intimates (R. 312) that for the amount of its assessments, whether valid or not, the operating company has an equitable lien of which it cannot be deprived for the reason that it has preserved the property in which respondents have a large beneficial interest.

It is, of course, a somewhat startling doctrine that the owner of mortgaged property of which he is in possession and enjoying the benefits has a paramount equitable lien over the mortgagee for sums expended in the upkeep and repair of the property. In fairness, however, it must be recalled that this property is of a special nature. So let us examine this conclusion in the light of the evidence.

The principal expense in the operation of irrigation works is *the cost of the water service*. It is primarily the expense of distribution of water among the consumers.

The salaries of watermasters, ditch riders, and the like, come clearly within this category. It was stipulated and admitted in the record as follows:

> "MR. SNOW: I think it may be admitted that the assessments as levied were not excessive, but reasonably necessary in the operation and maintenance and improvement of the canal system. • • • Further that the money so raised was used for the reasonable and necessary expenses of the company in the operation and management of the irrigation ditch."
>
> (R. 99.)

J. W. Christensen, the Secretary of the operating company, testified (R. 108) that they paid a watermaster $125.00 a month for the irrigation season; four ditch riders were paid $100.00 per month; the salary of the secretary of the company was $40.00 per month the year around; the manager received $2,000.00 a year (R. 110); about $20,000.00 was expended in the actual improvement of the system on sections where the upper ditch bank "had previously not been cemented." (R. 109.)

These items, constituting the bulk of the expense, could surely not be regarded as money spent for the preservation of the respondents' security; they were *operating expenses;* they constituted the expense of the delivery of water among the consumers. The shares of stock sold for delinquent assessments, after such sale, received no water service. The Secretary of the operating company testified (R. 108):

> "As a general thing the corporation has delivered no water to the owners of the shares of stock after the sale to my company for delinquent assessments."

If the operating company, on equitable principles, is entitled to an equitable lien for the preservation of the security of respondents, surely the amount of money spent in the preservation of the property should be segregated. The burden was on the operating company to set up in its answer the sum so expended and to segregate such sums from the moneys spent for service to consumers in the distribution of water and sums expended for desirable improvements. The operating company neither pleaded nor proved an equitable lien. On the other hand, it pleaded and sought to prove *statutory assessments* under the general corporation law; but these are void because excessive, and even if valid, subordinate under the law to plaintiff's lien.

There seems to run through the trial court's opinion and the arguments of petitioner before the various tribunals wherein this cause has been heard the subtle innuendo that the construction company or "promoting" company, as it is so studiously called, has in some manner failed in its obligations. Whatever may have been the defaults of other Carey Act construction companies, the record in this case shows that the Portneuf-Marsh Valley Irrigation Company has fulfilled all its obligations. In the settlement agreement between the construction company and the operating company made at the time the project was completed, it is recited (R. 152):

> "Said operating company is now willing to accept and receive the said system in its entirety as fully completed in accordance with the terms of the (State) contract aforesaid . . . and to recognize that the obligations of said construction company under the terms of said contract aforesaid are now fully fulfilled and at an end . . ."

The construction company on that occasion paid to the operating company the sum of $31,000.00 to be expended by the operating company in betterments and repairs, and completion of the irrigation system, and for that sum and the other considerations in the agreement recited, it was therein provided:

> "The operating company expressly undertakes and agrees to hold the construction company harmless from any claim or demand growing out of the construction *or operation* of said irrigation system."
>
> (R. 155.)

This was repeated in the deed and agreement of conveyance whereby the irrigation works were conveyed to the operating company (R. 176).

It would seem, under these circumstances and in view of the existing agreements between the construction company and the operating company, eminently unfair to decree to the operating company an equitable lien on the property of the construction company or its assigns for a duty which the operating company, for a valuable consideration, took upon itself. An equitable lien upon the interest in the irrigation works owned by the construction company or its assigns growing out of the operation of the system would seem to be precluded under the particular facts of this case, even if the general principle were for a moment admissible.

THE SITUATION OF THE SETTLERS

The situation of the settlers presented by the record is by no means a harrowing one. During the eight years from 1915 to 1922, inclusive, as shown by the evidence

in this case, a total of $13.75 per acre has been levied as the total assessments. That sum is the aggregate of the several assessments shown, or attempted to be shown, to be levied. The water has been distributed, the system maintained, and according to the testimony, even improved, through collections from those settlers who have paid an of average of $1.71 per acre or per share each year. This is no excessive burden. The general knowledge and experience of certain members of the Court will show that it is not above the usual annual maintenance charges on large and successful irrigation projects of which they undoubtedly have knowledge. The equities are with respondents. The Court will apply the applicable statutes, contracts and by-laws according to their apparent meaning and intent. If the judgment of the Court of Appeals should be reversed and the claimed prior lien of the operating company upheld, it would result in the payment of nearly $90,000.00 to the settlers out of the first proceeds of the foreclosure sale. That sum invested at 6 per cent interest would produce a revenue of over $5,000.00 per year. In the future for ten years at least, the settlers would then have no maintenance assessments at all to pay for the distribution of their water, because the annual interest on the sum realized from the foreclosure sale in these proceedings, together with the gradual disbursement of that fund, would suffice for that period to operate the system.

The prior lien of nearly $90,000.00 claimed by petitioner amounts to over 40 per cent of the original debt of the bond issue. The sum due to respondent trustees at the time of the decree herein was upwards of $350,000.00. The aggregate liens on the property claimed by petitioner

and respondents amount accordingly to approximately $440,000.00, exclusive of interest accrued since the decree. There remain in Idaho considerable bodies of arid land which have not been reclaimed under the Carey Act. If it is held that the prior lien which it has always been supposed the statute imposed for repayment of the cost of construction of the irrigation works can be impaired through the creation of prior liens directly arising as in this case out of the settlers' failure to fulfill their obligations, there must of necessity be an end to Carey Act construction.

The funds invested by the bondholders whom the respondent trustees represent bear a striking analogy to the funds invested by the Government of the United States under the Federal Reclamation Act. The United States Reclamation Service is spending millions of dollars in the western states in the reclamation of arid public lands. The Reclamation Act provides that the settler shall repay to the Federal Government the actual pro rata cost of the irrigation works (32 Stat. 389). The installments of settlers' payments are stretched out over a long period of years. Even though the land may be patented to the settler, the government reserves "a lien prior to all others" for the future installments to fall due on the water right.

Irwin vs. Wright, 258 U. S. 219; 66 L. ed. 573.

Many of these federal projects are completed and have been turned over to irrigation districts, water users' associations or analagous organizations of settlers for operation and distribution of the water to the consumers. These irrigation projects, like Carey Act projects, require maintenance and operation after their completion. Con-

gress, in reserving its "lien prior to all others" for the cost of the construction of these projects clearly contemplated that during the long interval before the public moneys so expended are repaid the irrigation works would require such operation and maintenance and the distribution of water among the consumers.

How abhorrent it would be to the sense of justice of the average citizen if these various settlers' organizations could, under the specious guise of "preserving the property," levy assessments to cover the cost of distribution of the water among the consumers, the ordinary maintenance incidental to the use of the property, or the improvement of the property, and thus create liens on the irrigation works and water rights which would divest the Government of its right to be reimbursed for the cost of building the project. Should that possibility once be admitted, Congress would properly refuse to appropriate another dollar for reclamation purposes. The federal statute gives the government builder a prior lien in the case of government projects. The state statute in Idaho gives a prior lien to the builder of Carey Act projects. Neither lien is harsh or inequitable but reasonable and consonant with the highest justice. The Circuit Court of Appeals, in reversing the Trial Court in this case, said:

> "We are of the opinion that, upon the case made by the record, the bondholders are legally and equitably entitled to a prior lien for the amount due thereon on the entire irrigation system in question and its waters, and upon the interest in the said system and waters represented by the stock acquired by and held in the treasury of the canal company."

We respectfully submit that the decision of the Circuit Court of Appeals is correct and should be affirmed.

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APPENDIX

ORIGINAL "CAREY ACT" OF CONGRESS, BEING SECTION 4 OF THE ACT OF AUGUST 18, 1894 (28 STATUTES, 372-422):

SEC. 4. That to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation, and sale thereof in small tracts to actual settlers, the Secretary of the Interior, with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the state, to contract and agree, from time to time, with each of the states in which there may be situated desert lands as defined by the act entitled, "An Act to provide for the sale of desert land in certain States and Territories, approved March third, eighteen hundred and seventy-seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the state, free of cost for survey or price of such desert lands, not exceeding one million acres in each state, as the state may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert land law."

Before the application of any state is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the state shall file a map of the said land proposed to be irrigated, which shall exhibit a plan showing the mode of the contemplated irrigation,

and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the states, to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any state contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the state shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.

As fast as any state may furnish satisfactory proof, according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the state or its assigns for said lands so reclaimed and settled: *Provided*, That said states shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any state from the sale of said lands in excess of the cost of their reclamation shall be held as a trust fund for and be applied to the reclamation of other desert lands in such state. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury not otherwise appropriated one thousand dollars.

FEDERAL AMENDMENT TO "CAREY ACT" AUTHORIZING LIEN FOR EXPENSES OF RECLAMATION OF CAREY ACT LAND, BEING ACT APPROVED JUNE 11, 1896 (29 Stat., 413-434).

That under any law heretofore or hereafter enacted by any state providing for the reclamation of arid lands in pursuance and acceptance of the terms of the grant made in section four of an act entitled, "An Act making appropriations for the sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the state to which such lands are granted, and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such land, then patents shall issue for the same to such state without regard to settlement or cultivation: *Provided*, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part.

PERTINENT STATE LAWS RELATING TO CAREY ACT PROCEDURE IDAHO COMPILED STATUTES, 1919

SEC. 2996. *Acceptance of the Carey Act.* The State of Idaho accepts the conditions of Section 4 of an act of congress, entitled, "An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes," approved August 18, A. D. 1894, and the acts amendatory thereof, together with all the grants of land to the state under the provisions of the aforesaid act and its amendments.

The selection, management and disposal of said land shall be vested in the Department of Reclamation.

SEC. 3009. *Application to Enter Land.* Any citizen of the United States or any person having declared his intention to become a citizen of the United States (excepting married women) over the age of 21 years, may make application, under oath, to the department of reclamation, to enter any of said land in an amount not to exceed 160 acres for any one person; and such application shall set forth that the person desiring to make such entry does so for the purpose of actual reclamation, cultivation and settlement in accordance with the act of congress and the laws of this state relating thereto, and that the applicant has never received the benefit of the provisions of this chapter to an amount greater than 160 acres, including the number of acres specified in the application under consideration. Such application must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making application with the person, company or association who has

been authorized by the department to furnish water for the reclamation of said lands; and, if said applicant has at any previous time entered lands under the provisions of this chapter he shall so state in his application, together with description, date of entry and location of said land. The department shall thereupon file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant. All applications for entry shall be accompanied by a payment of 25 cents per acre, which shall be paid as a partial payment on the land if the application is allowed; and all certificates when issued shall be recorded in a book to be kept for that purpose. If the application is not allowed, the 25 cents per acre accompanying it shall be refunded to the applicant. The department shall dispose of all lands accepted by the state under the provisions of this chapter at a uniform price of 50 cents per acre, half to be paid at the time of entry and the remainder at the time of making final proof by the settler.

SEC. 3014. *Proof of Reclamation and Settlement: Patent.* Within one year after any person, company, or persons, association or incorporated company authorized to construct irrigation works under the provisions of this chapter shall have notified the settlers under such works that they are prepared to furnish water for the full irrigation season under the terms of their contract with the state, which notice, however, must first have been served upon the department of reclamation, which must cause an investigation of said works to be made, which shall include a report thereon by an engineer of the department, the said settler shall cultivate and reclaim not less than one-sixteenth part of the land filed upon, and within two

years after the said notice, the settler shall have actually irrigated and cultivated not less than one-eighth of the land filed upon, and within three years from the date of said notice, the settler shall appear before the department of reclamation, a judge or clerk of any Court of record within the state, or commissioners to be designated by the department within the state and make final proof of reclamation, settlement and occupation, which proof shall embrace evidence that he is the owner of shares in the works which entitle him to a water right for his entire tract of land sufficient in volume for the complete irrigation and reclamation thereof; that he has been an actual settler thereon and has cultivated and irrigated not less than one-eighth part of said tract; and such further proof, if any, as may be required by the regulations of the Department of the Interior and the Department of Reclamation of the State of Idaho.

The officer taking this proof shall be entitled to receive a fee of $2, which fee shall be paid by the settler and shall be in addition to the price paid to the state for the land: *Provided*, That when the department of reclamation takes final proof, all fees received by it shall be turned into the state treasury. The commissioners appointed by the department are hereby authorized to administer oaths.

All proof so received shall be submitted to the department of reclamation, and shall be accompanied by the final payment for said land, and, upon approval of the same by the department, the settler shall be entitled to his patent. If the land shall not be embraced in any patent theretofore issued to the state by the United States, the proofs shall be forwarded to the Secretary of the

Interior, with the request that a patent to said lands be issued to the state.

When the works designed for the irrigation of lands under the provisions of this chapter shall be so far completed as to actually furnish an ample supply of water in a substantial ditch or canal to reclaim any particular tract or tracts of such lands, the state of Idaho shall, through the Department of Reclamation, make proof of such fact and shall apply for a patent to such lands in the manner provided in the regulations of the Department of the Interior.

SEC. 3018. *Appurtenancy of Water Rights.* The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the State.

SEC. 3019. *Lien for Purchase Price of Water Right.* Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the lxst deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired.

SEC. 3020. *Record of Water Contract.* The contract for the water right upon which the aforesaid lien is founded shall be recorded in the office of the recorder of the county where said land is situate.

SEC. 3021. *Foreclosure of Lien.* Upon default of any of the deferred payments secured by any lien under the provisions of this chapter, the person, company or persons, association or incorporated company, holding or owning said lien, may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right.

SEC. 3022. *Foreclosure Sale.* All sales shall be advertised in a newspaper of general circulation, published in the county where said land and water right is situate, for six consecutive weeks, and shall be sold to the highest bidder at the front door of the courthouse of the county, or such place as may be agreed upon by the terms of the aforesaid contract. And the sheriff of said county shall in all suchcases give all notices of sale, and shall sell all such landsand water rights, and shall make and execute a certificate of sale to the purchaser thereof.

SEC. 3023. *Same: Limitation on Bid of Lienholder.* At such sale no person, company of persons, association or incorporated company, owning and holding any lien, shall bid in or purchase any land or water right at a greater price than the amount due on said deferred payment for said water right and land, and the costs incurred in making the sale of said land and water right.

SEC. 3024. *Record of Certificate of Sale.* Upon issuing any certificate of sale it shall be the duty of the sheriff to file for record in the office of the recorder of the county where such land is situated, a certified copy of such certificate of sale.

SEC. 3025. *Disposition of Proceeds of Sale.* Where such land and water rights are not purchased by the lien holder at such foreclosure sale, it shall be the duty of the sheriff

to first pay the lienholder out of the proceeds of such sale, the amount of the lien, together with all interest, costs and fixed charges thereon, and to pay any balance remaining to the person against whom such lien has been foreclosed, and for his services in such cases the sheriff shall receive the same fees as are provided by the law in civil cases.

SEC. 3026. *Redemption by Owner.* At any time within nine months after the foreclosure sale by the sheriff of the land and water rights aforesaid, the original owner against whom the lien has been foreclosed, may apply to the person, company of persons, association or incorporated company purchasing at such sale, to redeem such land and water rights, and the purchaser shall assign the certificate of sale of such land and water rights to such original owner, upon the payment by him within such nine months of the amount of the lien for which the same was sold at such foreclosure sale, together with the interest, costs and fixed charges thereon. In case the original owner shall redeem the land and water rights sold as aforesaid, he shall file for record in the office of the recorder the certificate of sale assigned to him by the purchaser as aforesaid, upon his redemption of such land and water rights.

SEC. 3027. *Redemption Purchase by Prospective Settler.* Where the lienholder becomes the purchaser at such foreclosure sale, if such land and water rights are not redeemed by the original owner within nine months, then at any time within three months after the expiration of such nine months, any person desiring to settle upon and use such land and water rights may apply to the purchaser at such foreclosure sale to redeem such land and water rights, and such purchaser shall assign the certificate of sale of

such land and water rights to the person desiring to redeem the same, upon the payment by him, within such three months, of the amount of the lien for which the same was sold at such foreclosure sale, together with the interest, costs and fixed charges thereon. In case the land and water rights shall be redeemed by any person other than the original owner, the sheriff shall, upon presentation of such certificate, issue a deed for such land and water rights to the person so redeeming the same.

SEC. 3028. *Sheriff's Deed to Purchaser on Foreclosure.* If the land and water rights shall not be redeemed by any person within the times and in the manner hereinbefore provided, it shall be the duty of the sheriff, upon presentation of the certificate of sale by the original purchaser, to issue a deed to such purchaser.

PERTINENT SECTIONS OF IDAHO COMPILED STATUTES RELATING TO ASSESSMENTS ON STOCK OF CORPORATIONS.

SEC. 4733. *Directors May Levy Assessments.* The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, and to the extent, herein provided.

SEC. 4734. *Limitation on Assessments.* No one assessment must exceed 10 per cent of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided, as follows:

1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount.

2. The directors of railroad corporations may assess the capital stock in installments of not more than 10 per centum per month, unless in the articles of incorporation it is otherwise provided.

3. The directors of fire insurance corporations may assess such a percentage of the capital stock as they deem proper.

The procedure relating to levying and collecting of assessments is set forth in Sections 4735 to 4751, Idaho Compiled Statutes.